# Vol. I

## TRANSCRIPT OF RECORD

## Supreme Court of the United States

OCTOBER TERM, 1943

## No. 409

TENNESSEE COAL, IRON & RAILROAD COMPANY, SLOSS-SHEFFIELD STEEL & IRON COMPANY AND REPUBLIC STEEL CORPORATION, PETITIONERS,

*vs.*

MUSCODA LOCAL No. 123, ETC., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR CERTIORARI FILED OCTOBER 4, 1943.

CERTIORARI GRANTED NOVEMBER 15, 1943.

VOLUME I.

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TRANSCRIPT OF RECORD

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UNITED STATES

# CIRCUIT COURT OF APPEALS

FIFTH CIRCUIT.

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# No. 10278

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TENNESSEE COAL, IRON & RAILROAD COMPANY,
Appellant,

versus

MUSCODA LOCAL No. 123, ETC., ET AL.,
Appellees.

SLOSS-SHEFFIELD STEEL & IRON COMPANY,
Appellant,

versus

SLOSS RED ORE LOCAL No. 109, ETC., ET AL.,
Appellees.

REPUBLIC STEEL CORPORATION,
Appellant,

versus

RAIMUND LOCAL No. 121, ETC., ET AL.,
Appellees.

Appeals from the District Court of the United States for the Northern District of Alabama.

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(ORIGINAL RECORD RECEIVED APR. 4 42.)

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

TENNESSEE COAL, IRON & RAILROAD COMPANY, a Corporation,

Appellant,

versus

MUSCODA LOCAL No. 123, et al.,

Appellees.

SLOSS-SHEFFIELD STEEL & IRON COMPANY, a Corporation,

Appellant,

versus

SLOSS RED ORE LOCAL No. 109, et al.,

Appellees.

REPUBLIC STEEL CORPORATION, a Corporation,

Appellant,

versus

RAIMUND LOCAL No. 121, et al.,

Appellees.

## APPELLANTS' REQUEST THAT ONLY DESIGNATED PORTIONS OF THE RECORD BE PRINTED.

(Filed April 6, 1942.)

Come the Appellants, considering that the whole of the record deposited in this Court on April 4th, 1942 (hereinafter referred to as "the record") is not necessary to be considered by the Court, and request that only the following designated portions thereof be printed:

1. Stipulation of the parties dated December 3, 1941 and filed in the District Court on December 8, 1941, which appears on page 1 of the record.

2. Petition of Tennessee Coal, Iron and Railroad Company, with exhibits thereto, filed in the District Court on April 4, 1941, which appears at pages 2 through 89, both inclusive, of record.

3. Petition of Sloss-Sheffield Steel & Iron Company, with exhibits thereto, filed in the District Court on April 4, 1941, which appears at pages 94 through 156, both inclusive, of the record.

4. Petition of Republic Steel Corporation, with exhibits thereto, filed in the District Court on April 4, 1941, which appears at pages 160 through 200, both inclusive, of the record.

5. Answer in Civil Action No. 5232, of defendants affiliated with American Federation of Labor, filed in the District Court on May 17, 1941, which appears at pages 209 through 214, both inclusive, of the record.

6. Motion to dismiss and answer, in Civil Action No. 5232, of defendants affiliated with International Union of Mine, Mill and Smelter Workers, filed in the District Court on May 17, 1941, which appear at pages 215 through 230, both inclusive, of the record.

7. Motion to dismiss and answer, in Civil Action No. 5233, of defendants affiliated with International Union of Mine, Mill and Smelter Workers, filed in the District Court on May 17, 1941, which appear at pages 231 through 244, both inclusive, of the record.

8. Motion to dismiss and answer, in Civil Action No. 5234, of defendants affiliated with International Union of Mine, Mill and Smelter Workers, filed in the District Court on May 17, 1941, which appear at pages 245 through 256, both inclusive, of the record.

9. Order on pre-trial hearing, filed in the District Court on May 22, 1941, which appears on pages 260 through 265, both inclusive, of the record.

10. Order setting case down for trial on the merits, and decrees on various motions, etc., filed in the District Court on May 26, 1941, which appear on pages 266 through 267, both inclusive, of the record.

11. Motion of Philip B. Fleming for leave to intervene in Civil Action No. 5232, filed in the District Court on May 24, 1941, which appears on pages 269 and 270, both inclusive, of the record.

12. Answer of Philip B. Fleming, in Civil Action No. 5232, filed in the District Court on May 24, 1941, which appears on pages 271 through 275, both inclusive, of the record.

13. Order granting motion of Philip B. Fleming for leave to intervene, filed in the District Court on June 11, 1941, which appears on page 286 of the record.

14. Interrogatories propounded by plaintiffs to Philip B. Fleming, filed in the District Court on June 16, 1941, which appear at pages 295 through 316, both inclusive, of the record.

15. Order continuing trial of case, filed in the District Court on June 18, 1941, which appears on page 323 of the record.

16. Motion to dismiss counterclaim of American Federation of Labor, filed in the District Court on June 19, 1941, which appears at pages 324 through 326, both inclusive, of the record.

17. Motion to dismiss counterclaim of International Union of Mine, Mill and Smelter Workers, filed in the District Court on June 19, 1941, which appears at pages 327 through 329, both inclusive, of the record.

18. Amendment to complaints, filed in the District Court on June 19, 1941, which appears at pages 330 through 335, both inclusive, of the record.

19. Objections of Philip B. Fleming to interrogatories propounded by plaintiffs, filed in the District Court on June 27, 1941, which appear at pages 348 through 353, both inclusive, of the record.

20. Intervener's answer to interrogatories, with exhibits attached thereto, filed in the District Court on July 1, 1941, which appear at pages 366 through 410, both inclusive, of the record.

21. Amended answer of Philip B. Fleming, filed in the District Court on July 5, 1941, which appears at pages 433 and 434 of the record.

22. Amendment to complaint, as amended, of petitioner-plaintiff Tennessee Coal, Iron and Railroad Company, filed in the District Court on July 7, 1941, which appears at pages 451 through 454, both inclusive, of the record.

23. Amendment to complaint, as amended, of petitioner-plaintiff Sloss-Sheffield Steel & Iron Company, filed in the District Court on July 7, 1941, which appears at pages 455 through 459, both inclusive, of the record.

24. Amendment to complaint, as amended, of petitioner-plaintiff Republic Steel Corporation, filed in the District Court on July 7, 1941, which appears at pages 460 through 463, both inclusive, of the record.

25. Order consolidating for trial, filed in the District Court on July 7, 1941, which appears at page 464 of the record.

26. Amendment to petition and complaint of petitioner-plaintiff Republic Steel Corporation, filed in the District Court on July 31, 1941, which appears at pages 469 and 470 of the record.

27. Order allowing amendment of petition and complaint of Republic Steel Corporation dated July 13, 1941, which appears at page 471 of the record.

28. Motion of petitioner-plaintiff Tennessee Coal, Iron and Railroad Company for judgment or decree in its favor, filed in the District Court on September 6, 1941, which appears at pages 485 through 499, both inclusive, of the record.

29. Motion of petitioner-plaintiff Sloss-Sheffield Steel & Iron Company for judgment or decree in its favor, filed in the District Court on September 6, 1941, which appears at pages 500 through 514, both inclusive, of the record.

30. Motion of petitioner-plaintiff Republic Steel Corporation for judgment or decree in its favor, filed in the District Court on September 6, 1941, which appears at pages 515 through 531, both inclusive, of the record.

31. Findings of fact filed in the District Court on September 10, 1941, which appear at pages 532 through 540, both inclusive, of the record.

32. Conclusions of law filed in the District Court on September 10, 1941, which appear at pages 541 through 543, both inclusive, of the record.

33. Decree and judgment filed in the District Court on September 10, 1941, which appear at pages 544 and 545 of the record.

34. Motion to amend judgment, filed in the District Court on September 19, 1941, which appears on pages 546 and 547 of the record.

35. Causes for and in support of motion of petitioner-plaintiff Tennessee Coal, Iron and Railroad Company to amend judgment, which appear at pages 548 through 555, both inclusive, of the record.

36. Plaintiff's objections to findings of fact and motion for amendment thereof, which appear at pages 556 through 604, both inclusive, of the record.

37. Objections to conclusions of law, which appear at pages 605 through 610, both inclusive, of the record.

38. Motion of petitioner-plaintiff Tennessee Coal, Iron and Railroad Company for a new trial, with exhibits thereto, which appears at pages 611 through 620, both inclusive, of the record.

39. Page 621 of the record.

40. Order overruling plaintiff's motion for a judgment or decree in its favor, which appears at page 622 of the record.

41. Judgment and decree of the Court overruling plaintiff's motions and objections, which appear at pages 623 and 624 of the record.

42. Order overruling motion for a new trial, which appears at page 625 of the record.

43. Notice of appeal appearing on pages 626 and 627 of the record.

44. Concise statement of the points on which appellants intend to rely on the appeal, which appears at pages 635 through 647, both inclusive, of the record.

45. Stipulation of counsel as to abridgement of record, which appears at pages 648 through 667, both inclusive, of the record.

46. That portion of the stenographic report of the proceedings on trial, beginning with the first statement by Mr. Burr on page 710 of the record, through and including the eighth line from the bottom of page 778 thereof.

47. That portion of the stenographic report beginning with the 5th line from the bottom of page 795 of the record, through and including the 5th line from the bottom of page 803 thereof.

48. That portion of the stenographic report which appears at pages 805 through 933, both inclusive, of the record.

49. That portion of the stenographic report which appears at pages 935 through 1092, both inclusive, of the record.

50. That portion of the stenographic report beginning with page 1099 of the record continuing through and including the 15th line from the bottom of page 1260 thereof.

51. That portion of the stenographic report which appears at pages 1264 through 1439, both inclusive, of the record.

52. That portion of the stenographic report beginning with the 10th line from the bottom of page 1441 continuing through and including page 1609 of the record.

53. That portion of the stenographic report beginning with the 3rd line from the top of page 1612 continuing through and including the 7th line from the top of page 1866 of the record.

54. That portion of the stenographic report beginning with the 13th line from the bottom of page 1869 through page 1906 of the record.

55. That portion of the stenographic report beginning with the 12th line from the bottom of page 1908 through page 1927 of the record.

56. That portion of the stenographic report beginning with page 1945 continuing through and including the 2nd line from the bottom on page 1952 of the record.

57. That portion of the stenographic report beginning with the 12th line from the top of page 2021 through and including page 2075 of the record.

58. That portion of the stenographic report which appears at page 2079 of the record.

59. That portion of the stenographic report beginning with the 9th line from the bottom of page 2083 continuing through and including the 1st line from the top on page 2154 of the record.

60. That portion of the stenographic report beginning with the 2nd line from the bottom of page 2157 and continuing through and including the 7th line from the bottom of page 2158 of the record.

61. That portion of the stenographic report beginning with the 8th line from the top of page 2166 through and including page 2287 of the record.

62. That portion of the stenographic report which appears at pages 2291 through 2502, both inclusive, of the record.

63. That portion of the stenographic report beginning with the 10th line from the top of page 2513 continuing through and including the 5th line from the top of page 2702 of the record.

64. That portion of the stenographic report beginning with page 2718 continuing through and including the 7th line from the top of page 3163 of the record.

65. That portion of the stenographic report beginning with the 3rd line from the top of page 3166 continuing through and including the 6th line from the bottom of page 3206 of the record, with the exception of pages 2509, 2510, 2540, 3176 and 3177 thereof, which appellants request not be printed.

66. That portion of the stenographic report beginning with the 6th line from the top of page 3213 continuing through and including the 6th line from the bottom of page 3323 of the record.

67. That portion of the stenographic report which appears on page 3328 of the record, down to and including the 12th line from the bottom thereof.

68. Page 3497 of the record.

69. T. C. I. Exhibits Y-21 and Y-22, which appear on page 3506 of the record.

70. T. C. I. Exhibits Y-25 and Y-26, which appear on page 3508 of the record.

71. T. C. I. Exhibit No. 1, which appears at page 3534 of the record.

72. T. C. I. Exhibit No. 2, which appears at page 3535 of the record.

73. T. C. I. Exhibit No. 3, which appears at page 3536 of the record.

74. T. C. I. Exhibit No. 4, which appears at page 3537 of the record.

75. T. C. I. Exhibit No. 5, which appears at pages 3538 through 3541, both inclusive, of the record.

76. T. C. I. Exhibit No. 6, which appears at pages 3541 through 3544, both inclusive, of the record.

77. T. C. I. Exhibit No. 7, which appears at pages 3545 through 3550, both inclusive, of the record.

78. T. C. I. Exhibit No. 8, which appears at pages 3551 through 3564, both inclusive, of the record.

79. T. C. I. Exhibit No. 9, which appears at pages 3565 and 3566 of the record.

80. T. C. I. Exhibit No. 9-A, which appears at pages 3567 through 3571 of the record.

81. T. C. I. Exhibit No. 9-B, which appears at page 3572 of the record.

82. T. C. I. Exhibit No. 10 and Republic Exhibit No. 7, which appear at pages 3573 and 3574 of the record.

83. T. C. I. Exhibit No. 10-A, which appears on pages 3575 through 3582, both inclusive, of the record.

84. T. C. I. Exhibit No. 11, which appears at page 3583 through 3590, both inclusive, of the record.

85. T. C. I. Exhibit No. 12, which appears at pages 3591 through 3616, both inclusive, of the record.

86. T. C. I. Exhibit No. 13, which appears at pages 3617 through 3619, both inclusive, of the record.

87. Page 3620 of the record.

88. T. C. I. Exhibit No. 15, which appears at pages 3621 through 3623, both inclusive, of the record.

89. T. C. I. Exhibit No. 16, which appears at pages 3624 through 3632, both inclusive, of the record.

90. T. C. I. Exhibit No. 17, which appears on page 3633 of the record.

91. T. C. I. Exhibit 17-A, which appears on pages 3634 through 3636, both inclusive, of the record.

92. T. C. I. Exhibit 17-B, which appears at pages 3637 and 3638 of the record.

93. T. C. I. Exhibit 17-C, which appears at pages 3639 through 3642, both inclusive, of the record.

94. T. C. I. Exhibit 17-E, which appears at pages 3644 and 3645, both inclusive, of the record.

95. T. C. I. Exhibit 18, which appears at pages 3646 through 3652, both inclusive, of the record.

96. T. C. I. Exhibit 19, which appears at pages 3653 through 3660, both inclusive, of the record.

97. T. C. I. Exhibit No. 20, which appears at pages 3661 through 3669, both inclusive, of the record.

98. T. C. I. Exhibit No. 21, which appears at pages numbered 3670 and 3671 of the record.

99. T. C. I. Exhibit No. 22, being a reprint of two articles from the September 1937 issue of the Engineering and Mining Journal, which appears at page 3672 of the record.

100. Sloss Exhibit No. 1, which appears at pages 3673 through 3676, both inclusive, of the record.

101. Sloss Exhibit No. 3, which appears at pages 3677 through 3681, both inclusive, of the record.

102. Sloss Exhibit No. 7, which appears at pages 3684 through 3694, both inclusive, of the record.

103. Sloss Exhibit No. 8, which appears at pages 3695 through 3703, both inclusive, of the record.

104. Sloss Exhibit No. 9, which appears at pages 3704 through 3710, both inclusive, of the record.

105. Sloss Exhibit No. 10, which appears at page 3711 of the record.

106. Sloss Exhibit No. 11, which appears at page 3712 of the record.

107. Sloss Exhibit No. 12, which appears at pages 3713, 3714 and 3715 of the record.

108. Sloss Exhibit No. 13, which appears at page 3716 of the record.

109. Sloss Exhibit No. 14, which appears at pages 3717 through 3723, both inclusive, of the record.

110. Sloss Exhibit No. 15, which appears at pages 3724 through 3733, both inclusive, of the record.

111. Sloss Exhibit No. 16, which appears at pages 3734 through 3740, both inclusive, of the record.

112. Sloss Exhibit No. 17, which appears at pages 3741 through 3753, both inclusive, of the record.

113. Page 3754 of the record.

114. Sloss Exhibit No. 19, which appears at pages 3755, 3756 and 3757 of the record.

115. Sloss Exhibit No. 20, which appears at page 3758 of the record.

116. Sloss Exhibit No. 21, which appears at page 3759 of the record.

117. Sloss Exhibits No. 22-8, No. 22-9, and No. 22-10, all of which appear at page 3762 of the record.

118. Sloss Exhibit No. 23, which appears on page 3780 of the record.

119. Sloss Exhibit No. 24, which appears at pages 3781 through 3784, both inclusive, of the record.

120. Sloss Exhibit No. 25, which appears at pages 3785 through 3788, both inclusive, of the record.

121. Sloss Exhibit No. 26, which appears at pages 3789 and 3790 of the record.

122. Sloss Exhibit No. 27, which appears at pages 3791 through 3798, both inclusive, of the record.

123. Sloss Exhibit No. 28, which appears at pages 3799, 3800 and 3801 of the record.

124. Sloss Exhibit No. 29, which appears at pages 3802 through 3805, both inclusive, of the record.

125. Sloss Exhibit No. 30, which appears at pages 3806 and 3807 of the record.

126. Sloss Exhibit No. 31, which appears at pages 3808, 3809 and 3810 of the record.

127. Sloss Exhibit No. 31-A, which appears at page 3811 of the record.

128. Sloss Exhibit No. 32, which appears at pages 3812 through 3822, both inclusive, of the record.

129. Sloss Exhibit No. 33, which appears at pages 3823 through 3834, both inclusive, of the record.

130. Sloss Exhibit No. 34, which appears at pages 3835 through 3847, both inclusive, of the record.

131. Sloss Exhibit No. 35, which appears at pages 3848 through 3852, both inclusive, of the record.

132. Sloss Exhibit No. 36, which appears at pages 3853 through 3865, both inclusive, of the record:

133. T. C. I. Exhibit No. 24, which appears at page 3867 of the record.

134. Republic Exhibit No. 1, which appears at page 3883 of the record.

135. Republic Exhibit No. 2, which appears at pages 3884 and 3885 of the record.

136. Republic Exhibit No. 3, which appears at pages 3886 and 3887 of the record.

137. Republic Exhibit No. 4, which appears at pages 3888 through 3892, both inclusive, of the record.

138. Republic Exhibit No. 5, which appears at pages 3893 through 3902, both inclusive, of the record.

139. Republic Exhibits No. 6, No. 7, No. 8, No. 9 and No. 10, all of which appear on pages 3903 through 3915, both inclusive, of the record.

140. Republic Exhibit No. 16, which appears at page 3935 of the record.

141. Plaintiff's Exhibit No. 7, which appears at page 3936 of the record.

142. Sloss Exhibit No. 2, which appears at pages 3937 through 3942, both inclusive, of the record.

143. Page 3943 of the record, being the title page of Plaintiff's Exhibit No. 35.

144. Beginning with the 6th line from the top of page 3951 continuing through and including page 4255 of the record, being a further portion of Plaintiff's Exhibit No. 35.

145. Pages 4327 through 4333, both inclusive, of the record, being a further portion of Plaintiff's Exhibit No. 35.

146. Plaintiff's Exhibit No. 36, which appears at pages 4334 through 4358, both inclusive, of the record.

147. Plaintiff's Exhibits 37 and 38, which respectively appear at page 4359 and 4360 of the record.

148. Plaintiff's Exhibit No. 8, which appears at page 4362 of the record.

149. Plaintiff's Exhibit No. 49, which appears at pages 4363 and 4364 of the record.

150. Defendant's Exhibits No. 1, No. 5, No. 6, No. 11, and No. 12, all of which are set out at pages 4376 through 4390, both inclusive, of the record.

151. T. C. I. Exhibits No. 30-A and No. 30-B, both of which are set out at pages 4394 through 4400, both inclusive, of the record.

152. Defendant's Exhibit No. 19, which appears at page 4421 of the record.

153. Intervener's Exhibits No. 1 through No. 43, both inclusive, all of which appear at pages 4422 through 4464, both inclusive, of the record.

154. Defendant's Exhibits No. 20 through No. 28, both inclusive, which appear at pages 4465 through 4485, both inclusive, of the record.

155. Defendant's Exhibits No. 13, No. 14, No. 16, No. 17, and No. 18, all of which are set out at pages 4486 through 4493, both inclusive, of the record.

156. Defendant's Exhibits No. 10 and No. 29, both of which appear at pages 4501 through 4509, both inclusive, of the record.

157. T. C. I. Exhibit No. 32, which appears at page 4510 of the record.

158. Defendant's Exhibits No. 30 through No. 35, both inclusive, all of which appear at pages 4511 through 4516, both inclusive, of the record.

159. T. C. I. Exhibits No. 33 through No. 39, both inclusive, all of which appear at pages 4517 through 4523, both inclusive, of the record.

160. Sloss Exhibits No. 43 through No. 50, both inclusive, all of which appear at pages 4524 through 4531, both inclusive, of the record.

161. Page 4532 of the record.

162. Plaintiff's Exhibits No. 51, and No. 16 through No. 21, both inclusive, all of which appear at pages 4534 through 4576, both inclusive, of the record.

163. Page 4577; the heading (being the first 5 lines) on page 4578; the last two lines on page 4588; pages 4589 and 4590; page 4591 down to and including the 15th line

from the bottom thereof; the last 16 lines on page 4593; the heading and the opening paragraph on page 4594; beginning with the third line on page 4598 continuing through and including page 4604: all being the relevant portion of Plaintiff's Exhibit No. 45.

164. Pages 4605 through 4625 of the record (being a number of exhibits identified and offered in evidence by plaintiffs but excluded upon objection of appellees).

165. Pages 4631 through 4699, and pages 4703 through 4776, of the record (being those remaining exhibits so excluded upon objection of appellees which are set out in the record, and omitting only those pages on which three exhibits through error were set out twice).

166. Pages 4777 through 4793 (being the designations of contents of record on appeal as filed in the District Court by the various parties).

167. The certificate of the Clerk of the District Court, which appears on page 4794 of the record.

E. L. ALL,
(E. L. All)
BORDEN BURR,
(Borden Burr)
Attorneys for Appellants.

State of Alabama,
Jefferson County.

Before me, Mabel Wheeler, a Notary Public in and for Jefferson County, Alabama, personally appeared B. A. Monaghan, who, being by me first duly sworn, deposes and says as follows:

I mailed, on April 4, 1942, a copy of the foregoing request to E. Crampton Harris, Esquire, Attorney of Record for appellees affiliated with the Congress of Industrial Organization; to Messrs. J. Q. Smith, Ralph Quinn and W. F. Spencer, Counsel of Record for appellees affiliated with

the American Federation of Labor; and to Jerome Cooper, Esquire, of Counsel for the intervener, the Administrator of the Wage and Hour Division of the United States Department of Labor.

B. A. MONAGHAN.

Sworn to and subscribed before me this 4th day of April, 1942.

MABEL WHEELER,
Notary Public.

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APPELLEES REQUEST THAT ALL THE RECORD DEPOSITED IN THIS COURT BE PRINTED.

Filed April 7, 1942.

United States Circuit Court of Appeals for Fifth Circuit.

Tennessee Coal, Iron & Railroad Company, a Corporation, Appellant,

vs. Civil Action No. 5232.

Muscoda Local No. 123, and unincorporated association affiliated with the International Union of Mine, Mill & Smelter Workers, et als, (Defendants), Appellees.

Sloss-Sheffield Steel & Iron Company, a Corporation, Appellant,

vs. Civil Action No. 5233.

Sloss Red Ore Local No. 109, an unincorporated association affiliated with the International Union of Mine, Mill & Smelter Workers, et als, (Defendants), Appellees.

Republic Steel Corporation, a Corporation, Appellant,

vs. Civil Action No. 5234.

Raimund Local No. 121, an unincorporated association affiliated with the International Union of Mine, Mill & Smelter Workers, et als, (Defendants), Appellees.

Now come all the appellees in the above styled causes, by their several counsel, and request that the entire record

deposited in this Court on April 4, 1942 be printed in the order and as prepared by the Clerk of the United States District Court for the Southern Division of the Northern District of Alabama, for the reason that the whole of said record is necesssary to be considered by the Court. In support of this request the appellees respectfully show unto this Honorable Court the following:

1. Counsel for appellees have worked diligently on the preparation of this record and have entered into various and sundry stipulations with counsel for appellants in order to abbreviate the same.

2. Any further extension of the process of abbreviation of the record would deprive this Court of a true picture of the trial in the District Court and would not serve the ends of justice in view of the importance of the case and the number of persons affected thereby.

CRAMPTON HARRIS,
.....,
Attorneys for Muscoda Local No. 123, Sloss Red Ore Local, No. 109; Raimund Local No. 121, et als, Appellees.

J. Q. SMITH,
RALPH W. QUINN,
W. F. SPENCER,
Attorneys for Muscoda Local No. 21935, et al.

JEROME A. COOPER,
Atty. for the Intervener-Appellee, The Administrator of the Wage and Hour Division of the U. S. Department of Labor.

State of Louisiana,
Parish of Orleans.

Before Me, a Notary Public in and for said Parish in said State, personally appeared Crampton Harris, who being by me first duly sworn deposes and says as follows:

I have mailed on this 7th day of April, 1942, a copy of the foregoing request addressed to Mr. Borden Burr, Attorney at Law, Brown-Marx Building, Birmingham, Alabama as attorney for Tennessee Coal, Iron & Railroad Co. and another copy to Mr. Burr as attorney for the Republic Steel Corporation. I have also mailed a copy to Mr. Ernest L. All, Comer Building, Birmingham, Alabama, as counsel for the Sloss-Sheffield Steel & Iron Company.

CRAMPTON HARRIS.

Sworn to and subscribed before me this the 7th day of April, 1942.

NORTON L. WISDOM,
Notary Public.

(Seal)

My commission expires at death.

# TRANSCRIPT OF RECORD.

United States Circuit Court of Appeals, Fifth Circuit.

No. 10278.

Tennessee Coal, Iron & Railroad Company, a Corporation, Appellant

vs.

Muscoda Local No. 123, Etc., et al., Appellees.

Sloss-Sheffield Steel & Iron Company, a Corporation, Appellant

vs.

Sloss Red Ore Local No. 109, Etc., et al., Appellees.

Republic Steel Corporation, a Corporation, Appellant

vs.

Raimund Local No. 121, Etc., et al., Appellees.

Appeals from the District Court of the United States for the Southern Division of the Northern District of Alabama.

BENNERS, BURR, McKAMY & FOREMAN,

Birmingham, Alabama.

BRADLEY, BALDWIN, ALL & WHITE,

Attorneys for Appellant,

Birmingham, Alabama.

CRAMPTON HARRIS, Esquire,

Birmingham, Alabama.

J. A. LIPSCOMB, Esquire,

Bessemer, Alabama.

J. Q. SMITH, Esquire,

Birmingham, Alabama.

RAPLH W. QUINN, Esquire,
Birmingham, Alabama.

W. F. SPENCER, Esquire,
Birmingham, Alabama.

JEROME A. COOPER, Equire,
Birmingham, Alabama.

ABNER BRODIE, Esquire,
Attorneys for Appellee.

Washington, D. C.

In the District Court of the United States for the Northern District of Alabama, Southern Division.

Tennessee Coal, Iron and Railroad Company, a corporation, Petitioner and Plaintiff,
vs. Civil Action No. 5232.
Muscoda Local No. 123, an unincorporated association affiliated with the International Union of Mine, Mill & Smelter Workers, et al., Defendants.

Sloss-Sheffield Steel & Iron Company, a corporation, Petitioner and Plaintiff,
vs. Civil Action No. 5233.
Sloss Red Ore Local No. 109, an unincorporated association affiliated with the International Union of Mine, Mill and Smelter Workers, et al., Defendants.

Republic Steel Corporation, a Corporation, Petitioner and Plaintiff,
vs. Civil Action No. 5234.
Raimund Local No. 121, an unincorporated association affiliated with the International Union of Mine, Mill & Smelter Workers, et al., Defendants.

The parties hereto, subject to the approval of the appropriate Court, stipulate as follows:

1. That the hearing of the appeals herein be transferred from Montgomery, Alabama to New Orleans, Louisiana.

2. That said appeals may be taken upon a consolidated record.

This 3rd day of Dec. 1941.

E. I. ALL,
BORDEN BURR,
Attorneys for Plaintiffs,
CRAMPTON HARRIS,
Attorneys for Defendants affiliated with C. I. O.,
J. Q. SMITH,
W. F. SPENCER,
RALPH W. QUINN,
Attorneys for Defendants affiliated with American Federation of Labor,
JEROME A. COOPER,
Attorneys for Defendant-Intervener.

Filed December 8, 1941. Chas. B. Crow, Clerk, U. S. Dist. Court.

Approved:

RUFUS E. FOSTER,
Judge, U. S. Circuit Court of Appeals.

Apl. 10-42.

2 PETITION OF TENNESSEE COAL, IRON AND RAILROAD COMPANY.

Civil Action File No. 5232.

I.

Allegtions of Jurisdiction.

(a) That petitioner and plaintiff (hereinafter referred to as "plaintiff") is a corporation organized under the laws of the State of Tennessee and a resident of said State, authorized to transact business in the State of Alabama, and having its principal place of business and its mining and manufacturing operations in Jefferson County, State of Alabama;

(b) All of the defendants are citizens and residents of Jefferson County, State of Alabama;

(c) The matters in controversy, exclusive of interest and costs, exceed the sum of $3,000;

(d) That jurisdiction is also founded on the existence of a federal question in that it is a suit arising under a law regulating commerce;

(e) Jurisdiction is also founded in that this action arises under the Constitution of the United States and the Fifth Amendment to the Constitution of the United States;

(f) Jurisdiction is also founded in that this action arises under the Constitution of the United States and that provision of Section 8 thereof reading as follows:

"To regulate commerce with foreign nations, and among the several States, and with the Indian Tribes;"

in that the Act hereinafterwards referred to, commonly called "Fair Labor Standards Act of 1938", relates to and is based upon said clause;

(g) Jurisdiction is also founded on the existence of a question arising on a particular statute in that the action arises under the Act of June 25, 1938, Public Act No. 718 of the 75th Congress, Chapter 676, Sections 1 to 19, 52 Stat. 1060, Title 29 U. S. C., Sections 201 to 219, as amended by the Act of August 9, 1939, Public Act No. 344 of the 76th Congress, commonly called the "Fair Labor Standards Act of 1938", as hereinafter more fully appears.

(h) This action is to secure a declaratory judgment and such incidental injunctive relief as may be proper under the provisions of the Federal Declaratory Judgment Act, Title 28, U. S. C. A. 400, the Judicial Code, Section 274(d); the Act of March 3, 1911, Chapter 231, Paragraph 274(d), as amended June 14, 1934, Chapter 512; 48 Stat. 955, as amended by the Act of August 30, 1935; C 829, 405; 47 Stat. 1027;

(i) This action is also to secure such other different and more general relief as may be proper under the allegations herein contained.

## II.

### The Plaintiff and Its Operations.

Plaintiff owns and operates in Jefferson County, Alabama, eight underground iron ore mines and one under-

ground limestone mine, and at said mines employs 2650 workers whose duties require them to work underground (these underground employees are the employees of the plaintiff with whom the controversy, as hereinafter alleged, exists and who are hereinafter made parties defendant hereto); said underground employees representing seventy-eight percent of the total number of employees at said mines.

Access to the mine workings is by inclined slopes, varying from thirty degrees near the outcrop to six degrees at the bottom of the slopes, with an average vertical depth of cover over the present working places of 1200 feet. The workable seams of ore average ten feet more or less.

The method of mining is the modified room and pillar plan and a complete cycle averages three and a half months. In this cycle there are varying degrees of production due to restricted and unrestricted drilling conditions. In practice it has been found that approximately twelve shifts (double) encounter an average condition. Operating requirements for the year 1940 called for an average of 360,000 net tons of red ore and 21,300 tons of limestone per month. The wage rates are on an hourly basis as distinguished from a shift basis. These hourly rates have been established on a systematic basis, taking into consideration all factors which make up a proper occupational rate.

The plaintiff extracts from said mines iron ores and limestone, and said product is shipped to the Company's blast furnaces some three miles over its own railroad system and goes into the manufacture of pig iron. The pig iron (with the exception of a small unsubstantial amount) is manufactured into steel; the steel ingots, slabs and

billets; and from these the plaintiff manufactures steel rails, tin plate, bars, structural plates, sheets, nail, iron fencing, bolts and other products, such products being sold in various markets in competition with manufacturers of like products.

The plaintiff obtains a portion of its supplies and equipment from outside of the State of Alabama, and it ships the greater portion of its manufactured products by common carrier to points outside of the State of Alabama, and in some instances to foreign countries.

The plaintiff operates four underground coal mines, and uses the coal and by-products thereof in the manufacture of its products. The operations in its coal mines, insofar as the questions involved here are related and concerned, is in substance the same as its operations in its ore mines and limestone mine.

The general custom and procedure in the ore mines and limestone mine of the plaintiff, insofar as its 2650 underground employees are concerned, is substantially as follows:

The mines of the plaintiff are in three divisions: Muscoda Division, operating two ore mines and the limestone mine; Ishkooda Division, operating two ore mines; and the Wenonah Division, operating four ore mines.

For the convenience of its employees, the plaintiff provides bathhouse facilities at each mining division for which no charge is made. The employees are not compelled to use the bathhouse facilities, and the plaintiff does not require the presence of the miners at the bathhouses at any particular time or in any defined groups. No check-in or check-out is had at the bathhouses. While the use

of the bathhouses is not obligatory, they are used by substantially all of the plaintiff's employees.

The employee, after changing from street clothes to work clothes at the bath house, walks to the tipple or tipple house which is on the surface at the entrance to the mine and which is hereinafterwards referred to as the "portal". The distance from the bathhouses to the portal varies, the shortest distance being approximately 400 feet and the longest distance being approximately 2325 feet.

The employee provides his own mine lamp, and some two or three times per week has to secure carbide for his lamp. For the convenience of the employee, the plaintiff at a place near the portal sells carbide at cost. It is not obligatory upon the employee to buy his carbide from the plaintiff, but this provision is made for his convenience and practically all the employees take advantage of this convenience.

All underground men are lowered into the slopes in man skips to a central point called the "underground man loading station". From this point, the employees proceed on foot to their respective working places. For the purpose of transporting employees to the underground man loading stations, the plaintiff operates man skips. Three to six mantrips are required to lower the underground employees into the mine. The employees are not required to ride on any particular mantrip, but can follow their own wishes in determining which trip they shall ride. The first mantrip leaves the portal at approximately 6:07 A. M. All men are expected to be at their regular places of working at the starting time. Day turn operations begin at 6:45 A. M., and the night shift at 6:45 P. M. for all underground work. Day turn operations

cease at 3:15 P. M. and the night operations at 3:15 A. M., the men being allowed on their own time thirty minutes lunch period.

After the day's work has been completed and the power in the working places has been cut off, the employees walk from their working places to the underground man loading station and are hoisted in the same manner as they are lowered into the mines. The average first mantrip out leaves at 3:14 P. M. or A. M. and the average last mantrip out reaches the surface at 3:45 P. M. or A. M. The men complete their work and leave their working places at approximately 3:00 P. M. or 3:00 A. M. The men's time is computed and paid on the basis of eight hours' work at the working places, the time running from 6:45 A. M. or P. M. to 3:15 P. M. or A. M. (the men are allowed during the work time thirty minutes for lunch period, which is on their own time and excluded from the eight-hour workday).

The time taken in transportation from the portal to the underground man loading station and from the man loading station to the portal and the time taken in walking from and to the man loading station to and from the usual working place varies, but may be conservatively estimated as not less than one hour and not more than two hours. The time taken by the employees from the moment they leave the bathhouse before the beginning of the day's work until the moment they enter the bathhouse at the end of the day's work (as contended by the International Union of Mine, Mill & Smelter Workers, as hereinafterwards set forth); or the time taken from the moment they enter the bathhouse before the beginning of the day's work to the moment they leave the bathhouse at the end of the day's work (as contended by the American Federation of Labor as hereinafterwards set

forth) varies, but may be conservatively estimated as not less than two and one-half minutes and not more than twelve minutes.

In October, 1933, the plaintiff established in its ore and limestone mines an eight-hour day and a forty-hour week, and in December, 1936, established the payment of time and one-half for all time over eight hours in any one day and for all overtime in excess of forty hours in any one week, the eight-hour day meaning eight hours of work in and about the mines at the usual working place for all classes of labor, exclusive of the lunch period, whether the employees were paid by the day or paid on the tonnage basis.

All underground mine employees have been paid and accepted their wages on the basis of eight hours per day, from 6:45 A. M. or P. M. to 3:15 P. M. or A. M. The day's work begins at 6:45 A. M. and ends at 3:15 P. M. and the night turn begins at 6:45 P. M. and ends at 3:15 A. M. The plaintiff has never compensated its underground employees for any portion of their time spent in going to or from or in being transported to and from their actual workplace, and such employees have at all times understood and agreed that they should not receive any compensation therefor; and since June, 1934, by letters of understanding, and since May, 1937, by written contracts, such understanding has been specifically provided for by express agreements between the Company and the defendant unions, the average maximum wage paid the underground employee is sixty-eight cents and the minimum fifty-four and one-half cents per hour.

The allegations herein set forth as to operations at the present time are substantially and in all respects true as to operations since and prior to 1936.

## III.

### The Defendants.

(a) The defendants, Muscoda Local No. 123, Wenonah Local No. 157, and Ishkooda Local No. 153, affiliated with the International Union of Mine, Mill and Smelter Workers, are unincorporated associations, commonly known as "labor unions", each of whom has been selected by some of the plaintiff's employees as their representative for collective bargaining in all matters concerning wages, hours and conditions of employment, each of said unions representing some of the plaintiff's employees, the exact number being unknown to the plaintiff;

(b) The individual defendants, W. C. Gunnin, Pete Dulaney, R. H. Martin and John Thompson, are employees of the plaintiff, and officers and members of said Muscoda Local No. 123, who have selected said organization as their representative for collective bargaining;

(c) The individual defendants, C. J. McDaniel, W. B. Lemley, R. E. Lemley and Ward Jefferson, are employees of the plaintiff, and officers and members of said Wenonah Local No. 157, who have selected said organization as their representative for collective bargaining;

(d) The individual defendants, E. A. Sisemore, L. H. McBrayer, Elmore Mitchell and Dennis Hart, are employees of the plaintiff, and officers and members of said Ishkooda Local No. 153, who have selected said organization as their representative for collective bargaining;

(e) That the defendants, Muscoda Local No. 21935, Red Ore Miners Union, Wenonah Local No. 21936, Red

Ore Miners Union, and Ishkooda Local No. 21937, Red Ore Miners Union, affiliated with the American Federation of Labor, are unincorporated associations, commonly known as "labor unions", each of whom have been selected by some of the plaintiff's employees as their representative for collective bargaining in all matters concerning wages, hours and conditions of employment—each of said unions representing some of plaintiff's employees, the exact number being unknown to the plaintiff;

(f) The individual defendants, Fred Trammel, Joe P. Bell, W. R. Headrick and I. V. Robinson, are employees of the plaintiff, and officers and members of said Muscoda Local No. 21935, Red Ore Miners Union, who have selected said organization as their representative for collective bargaining;

(g) The individual defendants, W. W. Kendrick, G. L. Batson, Will McGhee and W. T. Maxwell, are employees of the plaintiff, and officers and members of said Wenonah Local No. 21936, Red Ore Miners Union, who have selected such organization as their representative for collective bargaining;

(h) The individual defendants, J. S. Pitts, James A. Bailey, Jr., A. E. Wesley, John White, James Knox, Nathan Smith and James Snow are employees of the plaintiff, and officers and members of said Ishkooda Local No. 21937, Red Ore Miners Union, who have selected said organization as their representative for collective bargaining;

(i) The individual defendants Van D. Jones, C. L. Pegues and Frank Allen are respectively the Executive Board Member, District No. 5, Secretary-Treasurer and Organizer of the International Union of Mine, Mill and Smelter Workers, an unincorporated national association, none of whom are employees of this plaintiff;

(j) That the individual defendants S. E. Roper and W. O. Hare are respectively the Organizer of the American Federation of Labor and Secretary-Treasurer of the Alabama Federation of Labor, affiliated with the American Federation of Labor, an unincorporated national association, none of whom are employees of this plaintiff;

(k) The defendants herein named are made parties defendant in their individual and representative capacities, as hereinabove set forth and described, under Rule 23 of Federal Rules of Civil Procedure as representatives of all of plaintiff's employees, as all of such employees represent a class that is so numerous as to make it impracticable to bring them all before the Court, and such individual defendants, representing as they do the employees and different groups thereof, so fairly represent all employees as to ensure adequate representation of all, and, are, therefore, sued because the right sought to be enforced by the plaintiff against all of the employees are several and there is a common question of law and fact affecting the several rights and common relief is sought against all.

Plaintiff has elected, in keeping with the statutes and rules of Court in such cases made and provided, and more especially Rule 23, Rules of Civil Procedure, to make and name as parties herein the above named and described defendants as being typical of the several classes of plaintiff's said underground mine employees whose rights would be affected by the decision to be rendered herein, and plaintiff avers that said employees, selected and named as defendants, properly and fairly represent all of said underground mine employees, and that said underground mine employees are all interested in and parties to the controversy hereinafterwards described.

The plaintiff invites the timely intervention in this action of any of its other underground mine employees who are not specifically or individually made defendants hereto to intervene or join herein as parties defendant, all to the end that the controversy herein set forth and shown may be fully and fairly determined by this Court in this proceeding.

The Administrator of the Wage and Hour Division, United States Department of Labor, as such Administrator, is interested in the construction (hereinafterwards prayed for) of Section 7 of the Act commonly called the "Fair Labor Standards Act of 1938", and the plaintiff invites the timely intervention in this action of such Administrator.

## IV.

### Statement of Controversy.

Plaintiff alleges that there is an actual and bona fide controversy existing as of the date of filing this petition between the plaintiff on the one hand and the defendants herein named on the other hand, said controversy growing out of the following facts and being as herein stated.

Said controversy relates to the judicial construction of Section 7 of the Act, said section reading as follows:

"Section 7(a) No employer shall, except as otherwise provided in this section, employ any of his employee who is engaged in commerce or in the production of goods for commerce—

(a) for a workweek longer than forty-four hours during the first year from the effective date of this section;

(2) for a workweek longer than forty-two hours during the second year from such date, or

(3) for a workweek longer than forty hours after the expiration of the second year from such date,

unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed".

The plaintiff asserts:

1. That in working its employees in and about their actual working places eight hours per day for five days per week it is not employing said employees for a "workweek" longer than forty hours.

2. That no part of the time (unless some actual service for the plaintiff is performed) spent by its underground employees in the bath house or in going from and to the bathhouse to or from the portal, or to and from the underground man loading station from or to the portal, or to or from the actual working places of the employees from or to the underground man loading station constitutes a part of the "workweek".

Otherwise stated, the plaintiff asserts that the Congress intended the word "workweek" to be construed as meaning the time actually spent by plaintiff's underground miners in or about their usual work places and did not intend to include as a part of the "workweek" the time spent by such underground employees in being transported or walking to and from the places where they actually work;

3. That the workday does not include the fixed lunch period of thirty minutes taken underground on the underground employees' time.

4. That if the Congress did intend that traveling time of plaintiff's underground employees to and from the places where they actually work or the lunch period should be considered as a part of the "workweek", such legislation is violative of the Fifth Amendment to the Constitution of the United States.

Some of the defendants (being members of the International Union of Mine, Mill and Smelter Workers, affiliated with the C. I. O.) assert:

1. That the Congress intended to include within the meaning of the word "workweek" all the time (including the lunch period) from the moment the underground employees leave the bathhouse before the beginning of the day's work until the moment they enter the bathhouse at the end of the day's work.

Otherwise stated, that the entire time (including the lunch period) from the moment the underground employees leave the bathhouse before the beginning of the day's work until the moment they enter the bathhouse at the end of the day's work should be considered as a part of the "workweek", and that the underground employees should be paid for all such time and should be paid overtime for such portion of the "workweek", as thus defined, which exceeds forty hours since October 24, 1940, and forty-two hours from October 24, 1939, to October 24, 1940, and forty-four hours from October 24, 1938, to October 24, 1939.

Others of the defendants (being members of the Red Ore Miners' Union, affiliated with the American Federation of Labor) assert:

1. That the Congress intended to include within the meaning of the word "workweek" all the time (including the lunch period) from the moment the underground employees enter the bathhouse before the beginning of the day's work until the moment they leave the bathhouse at the end of the day's work.

Otherwise stated, that the entire time (including the lunch period) from the moment the underground employees enter the bathhouse before the beginning of the day's work until the moment they leave the bathhouse at the end of the day's work should be considered as a part of the "workweek", and that the miners should be paid for all such time, and should be paid overtime for such portion of the week's work, as thus defined, which exceeds forty hours since October 24, 1940, and forty-two hours from October 24, 1939, to October 24, 1940, and forty-four hours from October 24, 1938, to October 24, 1939.

The controversy involves a large sum of money because, if the assertions and contentions of the plaintiff are correct and its construction of the Act legal, it has paid to its underground employees all the compensation due them under the provisions of the Act. However, if the assertions and contentions of the underground employees are correct and their construction of the Act legal, plaintiff will be due its underground employees a large sum of money for overtime at a rate not less than one and one-half times the regular rate at which the underground employee was employed, which accrued indebtedness, if the estimates of the underground employees as to the

amount of overtime is correct, will amount to approximately one-half million dollars, and if the plaintiff continues in the performance of its understanding and contention that only time actually spent by an underground employee working at and around the usual work place constitutes the "workweek", the overtime and obligations of the plaintiff, therefore, will each day become increasingly larger.

Without a determination of this controversy, it is impossible for plaintiff to know and ascertain whether or not it is violating the Act.

V.

The Opinion of the Administrator.

On March 23, 1941, the Administrator of the Wage and Hour Division, United States Department of Labor, announced a "Modified Portal to Portal Wage-Hour Opinion" and report, a complete copy of said opinion and report is hereto attached, marked Exhibit "A", and made a part hereof.

Plaintiff avers that said report was made on March 15, 1941, for release on Sunday, March 23, 1941, and said opinion was made on March 17, 1941 for release on Sunday, March 23, 1941; that promptly upon receiving information as to said opinion and report, plaintiff, with other employers like situated, filed with the Administrator its application for a reconsideration of said opinion; that a hearing on such application for reconsideration was held on Friday, March 28, 1941, before such Administrator; and that the petition for a reconsideration was taken under advisement. Plaintiff avers that on April 1, 1941, the Administrator denied the petitions for reconsideration, but postponed the effective date from April 1, 1941, to May 1, 1941.

In said opinion the Administrator, in effect, expressed the opinion, and advises the plaintiff and other employers like situated, that the enforcement policy of the Division, effective May 1, 1941, will be that the workday in plaintiff's mines "starts when the miner reports for duty as required at or near the collar of the mine, and ends when he reaches the collar at the end of the shift".

Otherwise stated, it is the expressed opinion of the Administrator that the word "workweek" in said Act includes the entire portion of time spent by plaintff's underground miners in going from the entrance or portal of the mine to the places where they actually work, and in returning from such places to said portal.

Plaintiff has been advised by the counsel, and on such advice charges that the opinion expressed by the Administrator has no legal force; that the Administrator, under the provisions of the Act, has, and claims to have no authority to judicially determine the legal effect of said provision of the Act; and that the opinion as thus expressed by the Administrator is erroneous and illegal. Said opinion is by no means a determining factor in this proceeding, but illustrates and emphasizes the bona fides of the controversy as herein set forth and the necessity for having said controversy fully, fairly and promptly determined by this Court.

Said opinion serves as, and is claimed by defendants to be, the principal support for their asserted construction of Section 7 of the Act.

There appears in said report (Exhibit "A") the following footnote:

"While the Wage and Hour Division Bulletins are not binding on the Courts, it may be anticipated that Judges will accord them especial weight; see United States v. American Trucking Associations, Inc., 310 U. S. 534. The

Administrator has also from time to time issued statements concerning enforcement policy under which he proposes to proceed for reasons of administrative convenience." (Report, page 1, footnote 3.)

The institution and continuance in effect of the enforcement or threatened enforcement of said illegal and erroneous opinion of the Administrator subjects the plaintiff to the peril of the heavy penalties of the Act. Not only will plaintiff be subject to the peril of said penalties, but plaintiff has in existence at the present time contracts with the Ordnance Department of the War Department of the United States of America in large amounts for the manufacture of shell forging and other products essential for the national defense, and said contracts (as do other contracts of plaintiff) expressly provide that:

"No person employed by the plaintiff in the manufacture or furnishing of the materials, supplies, articles or equipment used in the performance of the contract shall be permitted to work in excess of eight (8) hours in any one day or in excess of forty (40) hours in any one week, unless such person is paid such applicable overtime rate as has been set by the Secretary of Labor",

and further provide that employees in the performance of the contract:

"* * * may be employed in excess of eight (8) hours in any one day or in excess of forty (40) hours in any one week, provided such person shall be paid for any hours in excess of such limits the overtime rate of pay which has been set therefor by the Secretary of Labor",

and such contracts further provide that the plaintiff shall maintain prescribed records of employment which:

"shall be available for the inspection and transcription of the authorized representatives of the Secretary of Labor",

and designates as among the records so to be maintained:

"wage and hour records for each such employee, including the rate of wages and the amount paid each pay period, the hours worked each day and each week, and the period during which each such employee was engaged on a Government contract with the number of such contract".

Said contracts further provide that the plaintiff:

"shall post a copy of the above and other stipulations in a prominent and readily accessible place at the site of the contract work, and shall keep such employment records as are required in the regulations under the Act available for inspection by authorized representatives of the Secretary of Labor."

Said contracts further provide, on account of the breach or violation of any of the above or other stipulations or representations, for "liquidated damages in addition to damages for any other breach of the contract in the sum of Ten ($10.00) Dollars per day * * * and a sum equal to the amount of any reduction, rebates, refunds or underpayment of wages due to any employee engaged in the performance of the contracts; and in addition the agency of the United States entering into the contract shall have the right to cancel same and to make open market purchases or to enter into other contracts for the completion of the original contract, charging any additional cost to the original contractor".

Therefore, so long as such illegal and erroneous opinion remains in enforcement effect by the Administrator, and until and unless it is in this declaratory judgment proceeding or by other proper legal proceedings judicially held illegal, plaintiff in the performance of its defense and other contracts will be called upon to either (a) comply (with irreparable loss and damage as hereinafterwards averred); or (b) undergo by not complying the peril of having its said contracts declared forfeited and of being subject to the heavy penalties in said contracts provided for in case of violation.

In view of the foregoing, plaintiff, therefore, deems it material and relevant to make the following averments, which it asserts show or tend to show the illegality and incorrectness of the Administrator's opinion, and the lack of weight which should be accorded said opinion by this Court in declaring the issue of law herein sought to be declared.

Plaintiff avers that such averments where stated as facts are true, and where not stated as facts, plaintiff has been informed thereof, believes such information, and on such information and belief avers that they are true.

1. Plaintiff on information and belief alleges that prior to July 23, 1940, the Wage and Hour Division of the United States Department of Labor issued to the press the following release:

"First Mining Company Enjoined.

"The Cornucopia Gold Mines, a corporation with principal offices in Seattle, Washington, has been restrained from violations of the Fair Labor Standards Act, according to an announcement of the Wage and Hour Division, U. S. Department of Labor. This is the first Wage and Hour case in which judgment has been entered against a

mining company. The corporation, operating a mine and mill near Cornucopia, Oregon, is engaged in the mining and concentrating of ore containing gold and silver.

"A judgment entered in the United States District Court for the Western District of Washington, Northern Division, on May 3, provides for the payment of restitution. Approximately $18,000 in back wages for overtime worked is due some 283 employees.

"An important stipulation contained in the judgment is that time spent by employees in traveling from the 'portal', or entrance, of the mine to the 'face', or place where they work, and from the 'face' back to the 'portal' is to be deemed time worked. This means that hereafter the miners are assured of wages from the time they enter the mine until they leave it. Heretofore the miners were required to show only six hours of work on their time cards although they were actually in the mine for eight hours. The mining company previously had not paid for the two hours consumed by the men riding into the tunnel in the mine property and going up or down the shafts to their place of work for the day."

That said release was printed in newspapers over the United States, including the newspapers of Birmingham, Alabama; and that the publication of said release was one of, if not the sole, motivating cause of the making by the defendant unions of the claims against the plaintiff for compensation to the underground miners for the time spent in going to and from their actual working places, and that (presented in flagrant violation of their written contract) these claims were the first insisted upon claims on the part of any underground employees for payment for time in going to and from their working places since mining became an industry in the State of Alabama.

The facts stated in said release above quoted were incorrect or incomplete. The true facts in reference to

the Cornucopia case referred to in such release were that the employer, previous to the enactment of the Act, had computed and paid wages on the "portal to portal" plan, and that following the enactment of the Act for the purpose of avoiding or coming within its terms, the employer began to compute and compensate its employees on the so-called "face-to-face" plan,* and charged as transportation time an arbitrarily set time for transportation against the working time of all employees without reference to the time actually spent by such employees in being transported to and from their working places, thereby not counting as a part of the "workweek" the time spent in transportation, although previously it had been the custom to include such time as a part of the "workweek". That under these circumstances the decree referred to in the above released statement was entered *by consent* of the parties.

Upon the publication in the various papers of the country of the release of the Administrator above referred to in reference to such decision, there followed the claim of defendants, in accordance with the information thus incorrectly set out in such release, that transportation time should be included in their "workweek" for which they should receive compensation.

Plaintiff avers that, as hereinbefore and hereinafterwards set out more in detail, the situation in its mines in reference to prior custom, prior contracts and the computation and payment of compensation was exactly the reverse from the facts that existed in the Cornucopia Gold Mine Company case.

2. Plaintiff alleges on information and belief that on or about Saturday, July 27, 1940, there was issued by

* Plaintiff uses the term "face to face" because of the fact that these terms have been used generally in describing plaintiff's method of operation. However, a more proper designation would be "working place to working place".

the United States Department of Labor, Wage and Hour Division, for release morning paper, Saturday, July 27, 1940, R-928, said release stating in substance that "two mining determinations were announced, one dealing with the status of lessees in mines and the other with working time in bituminous coal mines". In reference to the "determination" dealing with working time in bituminous coal mines, the release stated:

"Colonel Fleming announced that on the basis of an inquiry submitted by the bituminous coal mining industry, the Wage and Hour Division in carrying out its enforcement duties in that industry will accord great weight to 'any reasonable standards for determining working time which represent the prevailing customs and practices in the particular industry and are supported by a long history of bona fide collective bargaining agreements. In view of the circumstances described by the industry in submitting its inquiry, Colonel Fleming announced that practice of computing working time on a 'face to face' basis in the bituminous coal mining industry would not be unreasonable. Colonel Fleming explained the term 'face to face' to mean the productive work performed after the miner arrives at his usual working place, excluding the time spent in traveling from the portal or entrance of the mine to the place of work and the time spent in returning from the working place to the portal in the evening. The Administrator added that the determination in the bituminous coal mining industry should not be considered to apply to any mining operations where the traditional practice of computing hours worked differs from the custom in the bituminous coal mining industry."

Plaintiff alleges on information and belief that the Wage and Hour Division, United States Department of

Labor, issued for release Wednesday, September 18, 1940, G-81, an address scheduled for delivery of Colonel Philip B. Fleming, Administrator, Wage and Hour Division, United States Department of Labor, before the American Mining Congress, Colorado Springs, Colorado, Wednesday, September 18, 1940, and that in said address the Administrator stated, among other things:

"1. Must the time spent by the underground worker in traveling from the portal to the face be counted as time worked?

"2. Must time spent at lunch underground be considered as time worked?"

In reference to the matter herein involved, the Administrator, among other things, said:

"The portal-to-portal matter also has been presented to us by the bituminous coal mining industry. In response to inquiry I said that the Wage and Hour Division, in carrying out its enforcement duties in that industry, will accord great weight to any reasonable standards for determining working time which represent the prevailing customs and practices in the industry and are supported by a long history of *bona fide* collective bargaining agreements. In view of the circumstances described by the industry in submitting its inquiry, I announced that the practice of computing working time on a 'face-to-face' basis in bituminous coal mining would not be unreasonable. The term 'face-to-face' was explained to mean the productive work performed after the miner arrives at his usual working place, excluding the time spent in traveling from the portal or entrance of the mine to the place of work, and the time spent in returning from the working place to the portal at the end of the shift. This

determination in the bituminous coal mining industry should not be considered to apply to any mining operations where the traditional practice of computing hours worked differs from the custom in bituminous coal mining. In the Cornucopia case, for example, custom and tradition had long recognized the portal-to-portal basis of reckoning time worked.

"We are not yet disposed to take any particular position as to whether the half hour spent eating lunch underground may be deducted from hours worked. The problem is a very difficult one because the employee is required to eat under very unfavorable conditions and is subject to many of the hazards of his job while eating. On the other hand, we recognize that the employee does have time off in order to have lunch and an argument can be made that such time need not be considered as hours worked. But as I say, the Division is not prepared at the present time to make any definitive determination on this question."

4. Plaintiff alleges that at various times from July, 1940, until the middle of October, 1940, during which time the Wage and Hour Division of the United States Department of Labor had under investigation with full cooperation of the plaintiff the claims as presented by the unions that the underground miners were entitled under Section 7 of the Act to be compensated for the time spent in going to and from their work places, plaintiff was on several occasions informed by the representatives of the Administrator conducting or taking part in such investigation that in reaching a conclusion as to the claims of the unions, the Department would accord great weight to the prevailing customs and practices as supported by the history of bona fide collective bargaining agreements.

5. Plaintiff alleges on information and belief that hearings were held in Salt Lake City, Utah, conducted

by Harold Stein as the representative of the Administrator, on December 11 and 12, 1940; that said hearings related substantially, if not altogether, to the non-ferrous mines of the West and had no proper relationship either to the iron ore mines of plaintiff and of other operations in the State of Alabama or to the iron ore mines as constituting a national industry; that hearings were held in the City of Birmingham, Alabama, conducted by the said Harold Stein, on January 14 and 15, 1941; that said hearings related solely to the limestone mine and iron ore mines of the plaintiff, of the Republic Steel Corporation, Sloss-Sheffield Steel & Iron Company and Woodward Iron Company as operated in Jefferson County, State of Alabama; that the evidence and information given at such hearing established without dispute the fact that since mining has been an industry in Alabama, down to and including the present time, it has been the universal and unvarying custom in all underground mines (coal, iron, limestone and all others) to compute and pay underground employees compensation on the basis of "working place to working place" and that there has never been computed or paid any compensation for the time spent in transportation or in going to and from the actual working places, and that all contracts, including those now in existence with organizations representing the employees expressly provide for the computation and payment of underground employees on the basis of "working place to working place".

6. Plaintiff alleges that neither in the hearings at Salt Lake City, Utah, or Birmingham, Alabama, so far as plaintiff has been able to acquire knowledge, was any evidence given or statements taken relating to any ore mines in any other portion of the United States other than the Birmingham District, although plaintiff, on information and belief, charges that the percentage of iron

ore produced in the Birmingham District is less than ten (10) percent of the total production in the United States of America, and of the total production there has never been, except in a few times, (not more than one and one-half (1½) percent of the total, in states controlled by local statutes) in custom and practice the so-called "portal-to-portal" plan as sought to be instituted by the Administrator as representing his construction of Section 7 of the Act.

7. The plaintiff alleges that the opinion (Exhibit "A") is based upon the report (Exhibit "A") herginabove referred to, and that said report contains the following factual averments:

"(1) *Face to face.* The miners are paid only for working time at the face and excluding lunch. Except where the shift was measured only by the work performed, this is probably the oldest method of computing the shift, but the record indicates that only a small percentage of underground metal miners are still paid on this basis. The only important group of mines now operating on a face to face basis are those in Alabama.

"(2) *Collar to Collar.* Far more common than face to face in modern practice, and universal in the states of Utah and Arizona, where it is required by law, is the collar to collar basis. On this basis, the miner is paid for all time from the moment he descends from the surface to the moment he returns to the surface, except that in some mines the lunch period is not paid for. Characteristically, though not invariably, the collar to collar shift is eight hours. Ordinarily lunch is eaten on the company's time, but a fixed lunch period is normal nevertheless."

* * * * * * * * *

"* * * The great majority of metal miners nowadays work in mines where they are paid for part or all of their underground travel time."

The above statements are incorrect. There is not in the State of Alabama any appreciable production of gold, silver, copper, lead and zinc (the metals for the most referred to and covered by said report). The only ferrous mines in Alabama referred to and included in said report are the iron ore mines (although the coal mines and other mines in Alabama have always followed the same method of computing and paying wages as the iron ore mines follow). The method of mining and production of iron ore has no real similarity to that of the metals above referred to, the mining of which, so far as said report is concerned, is located principally in the Western states. The ore mines of Alabama do not in any way come in competition with said metal mines; and there is no practical, logical or historical reason for considering the ore mines of Alabama in relation to or in connection with the metal mines above referred to.

The ore mining industry of the United States is one of tremendous size and importance. In the year 1940 there was produced in the United States a total of approximately 76 million tons of iron ore. Of this total amount, approximately 63 million tons or 84.2% were produced by the mines located in what is known as the Lake Superior ore mining territory, approximately 7 million tons or 9.5% were produced by the ore mine of Alabama, approximately 3 million tons or 4.7% were produced by the iron ore mines of New York, New Jersey and Pennsylvania, and 1½ million tons or 1.6% were produced by the iron ore mines of Utah and Wyoming. Of the small amount produced in the Western states of Utah and Wyoming, approximately 90% thereof is produced in the State of Utah, which is controlled by a state

statute requiring computation and payment of compensation on the so-called "portal to portal" basis.

Instead of, as recited in said report, the "greater majority of metal miners nowadays working in mines being paid for part or all of their underground travel time" and the "only important group of mines now operating on the 'face to face' basis are those located in Alabama", substantially all of the iron ore mines in the United States have always been, and are at the present time, operated upon and the compensation of their employees computed and paid on the "working place to working place" plan. In approximately 100% of the mines of the United States producing iron ore, there is not now and has never been in operation the so-called "collar to collar" plan. Even in the non-ferrous mines, there has never been in existence, except in a negligible degree the "portal to portal" plan.

Plaintiff avers that the basis for the opinion as given in the report and the reason therein assigned for applying the measuring rod of "face to face" to the bituminous coal mines of the United States and the measuring rod of "portal to portal" or "collar to collar" to the iron ore mines of the United States is not supported by the facts; that no real distinction can be made between the bituminous coal mining industry and the iron ore mining industry; and that the correct construction of Section 7 of the Act as applied not only to these industries, but to all other industries, is that the word "workweek" was used by the Congress as meaning actual work at the usual working places, and it was not the intention of the Congress to include in the word "workweek" time spent by an employee in going to and from his place of work, during which time he is not in any way engaged in the performance of any physical labor or of actual service for the employer.

## VI.

Necessity for the Relief of a Declaratory Judgment.

1. The act contains, among others, the following provisions:

Section 15:

"* * * it shall be unlawful for any person—

"(1) to transport, offer for transportation, ship, deliver, or sell in commerce, or to ship, deliver, or sell with knowledge that shipment or delivery or sale thereof in commerce is intended, any goods in the production of which any employee was employed in violation of Section 6 (minimum wages*) and section 7 (maximum hours), or in violation of any regulation or order of the Administrator issued under Section 14 (relating to learners, apprentices, etc.) * * *;

"(2) to violate any of the provisions of Section 6 (minimum wages) and Section 7 (maximum hours), or any of the provisions of any regulation or order of the Administrator issued under Section 14 (relating to learners, apprentices, etc.);

"(3) to dicharge or in any other manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this Act, or has testified or is about to testify in any such proceeding, or has served or is about to serve on an industry committee;

"(4) to violate any of the provisions of Section 12 (prohibition against child labor);

* Parenthesis and emphasis herein ours.

"(5) to violate any of the provisions of Section 11(c) (relating to reports, etc.), or to make any statement, report, or record filed or kept pursuant to the provisions of such section or of any regulation or order thereunder, knowing such statement, report or record to be false in a material respect."

Section 16:

"(a) Any person who wilfully violates any of the provisions of Section 15 shall upon conviction thereof be subject to a fine of not more than $10,000 or to imprisonment for not more than six months, or both. No person shall be imprisoned under this subsection except for an offense committed after the conviction of such person for a prior offense under this subsection.

"(b) Any employer who violates the provisions of Section 6 or Section 7 of this Act shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensations, as the case may be, and in an additional equal amount as liquidated damages. Action to recover such liability may be maintained in any Court or competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated, or such employee or employees may designate an agent or representative to maintain such action for and in behalf of all employees similarly situated. The Court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action."

As hereinbefore alleged, the plaintiff, under its assertion that "workweek" means time spent in the under-

ground miners' usual working places, has, since October, 1933, employed, and now employs, its underground miners at their usual places of work forty hours per five-day week. It therefore follows that if the assertions and contentions of either the Administrator or of any class of plaintiff's underground mining employees are correct, that plaintiff will be subject, among other things, first, to the penalties set forth in section 16(a), second, to the unpaid overtime compensation and to an additional equal amount as liquidated damages and a reasonable fee to be paid to the attorneys of such underground employees who bring suits, together with the costs of the actions, third, to the costs, expenses and inconvenience of a multiplicity of actions, depending upon how many of said underground mining employees of the plaintiff institute such legal proceedings, and, fourth, to the peril incident to the performance of its Government defense and other contracts.

2. *Threatened litigation:*

Plaintiff is in immediate peril of threatened litigation because:

A. Defendants, Muscoda Local Number 123, Wenonah Local Number 157 and Ishkooda Local No. 153, affiliated with the International Union of Mine, Mill and Smelter Workers (C. I. O. organization) on or about October 5, 1940, presented to the plaintiff a written officially adopted resolution and statement asserting that the plaintiff had required its underground employees "to be on the premises on duty and in the performance of their work for the company ten hours per day, totaling fifty hours per "workweek" (the claim being based upon the alleged statement that two hours were spent on the premises of the plaintiff in time spent in the bathhouse or in transportation or

walking to and from the working place and the thirty minute lunch period), and demanding payment by the plaintiff of "all back time since the effective date" of the Act. A copy of said resolution is hereto attached, marked Exhibit "B", and made a part hereof.

B. Defendants, Muscoda Local Number 123, Wenonah Local Number 157 and Ishkooda Local No. 153, affiliated with the International Union of Mine, Mill and Smelter Workers, by and through their duly constituted and authorized officers, and through their legal counsel, asserted and contended in the conferences held by the Wage and Hour Division of the United States Department of Labor in Birmingham, Alabama, on January 14 and 15, 1941, that under the provisions and terms of the Act they were entitled to have counted as part of the "workweek" of their members approximately two hours claimed to have been spent each workday from the moment they leave the bathhouse before the beginning of the day's work until the moment they enter the bathhouse at the end of the day's work and including the thirty minute lunch period.

C. Defendant officers and members and other members of said defendants, Muscoda Local Number 123, Wenonah Local Number 157 and Ishkooda Local No. 153, affiliated with the International Union of Mine, Mill and Smelter Workers, and defendants Jones, Pegues and Allen, have for several months past, and up to and including the time of the filing of this petition, made many and repeated statements and threats to institute and prosecute suits against the plaintiff under the provisions of the Act for the purpose of enforcing the payment by plaintiff of overtime (claimed as above set forth) at the rate of one and one-half times the regular rate at which plaintiff's underground miners were employed, together with attorneys' fees and costs.

D. Plaintiff has been informed, believes such information, and on such information and belief charges that said defendants, Muscoda Local Number 123, Wenonah Local Number 157 and Ishkooda Local No. 153, affiliated with the International Union of Mine, Mill and Smelter Workers have employed attorneys and authorized and directed them to proceed in the prompt bringing of such legal proceedings as may be necessary to enforce against the plaintiff their claims for such overtime payments, together with attorneys' fees and costs.

E. Said defendants, Muscoda Local Number 21935, Wenonah Local Number 21936 and Ishkooda Local Number 21937, Red Ore Miners Union, affiliated with the American Federation of Labor) by and through their duly constituted and authorized officers and through their legal counsel contended in conferences held by the Wage and Hour Division of the United States Department of Labor in Birmingham, Alabama, on January 14 and 15, 1941, that under the provisions and terms of the Act they were entitled to have counted as part of the "workweek" of their members approximately three hours claimed to have been spent each workday from the moment the underground employees of plaintiff entered the bathhouse before the beginning of the day's work to the moment they leave the bathhouse at the end of the day's work, including the lunch period of thirty minutes.

F. Defendant officers and members and other members of said Locals have for several months past and up to and including the date of the filing of this petition made many and repeated statements and threats to institute and prosecute suits against the plaintiff under the provisions of the Act for the purpose of enforcing the payment of the alleged overtime (claimed as above set forth) at the rate of one and one-half times the regular rate at which plain-

tiff's underground miners were employed, together with attorneys' fees and costs.

G. Plaintiff has been informed, believes such information, and on such information and belief charges that said defendants, Muscoda Local Number 21935, Wenonah Local Number 21936, Ishkooda Local Number 21937, Red Ore Miners Union have employed attorneys and authorized and directed them to proceed in the prompt bringing of such legal proceedings as may be necessary to enforce against the plaintiff their claims for such overtime payments, together with attorneys' fees and costs.

H. Plaintiff has been informed, believes such information, and on such information and belief charges that on Sunday, March 23, 1941, defendant Van D. Jones, Executive Board Member of District No. 5 of the International Union of Mine, Mill and Smelter Workers, and the principal administrative officer of the said Union in the State of Alabama, referring to the "portal to portal" opinion of the Administrator, publicly announced in the press that the red ore miners of the Birmingham District, members of his union, would at once seek to recover a million dollars in back wages claimed to be due from plaintiff and other operators of iron ore mines in Jefferson County, Alabama, and that approximately 6000 Alabama red ore miners would bring litigation for the purpose of enforcing the collection of the claimed amounts.

Wherefore, Plaintiff asserts that it is threatened with the immediate institution and prosecuton of a multiplcity of suits involving large sums of money, and unless the declaration herein prayed for is granted, the plaintiff will be faced with great, if not irreparable, injury.

VII:

Probability of Great, If Not Irreparable, Injury.

If the declaratory judgment herein prayed for is not granted, the plaintiff is in immediate peril of suffering great and irreparable injury because (among other things):

1. Of the vexation, cost and expense of a multiplicity of suits;

2. Of the delay in the settlement and determination of the controversy which will necessarily follow if the prompt remedy afforded by the Declaratory Judgment Act and Rule 57, Rules, District Court of the United States, is not applied and the final determination of the legal question involved is left to the adjudication of such threatened suits, the bringing of which is immediately imminent;

3. Of the fact that, under the provisions of the Act, the threatened suits for overtime payments may be brought in different jurisdictions, in Federal Courts or in State Courts, and will be encumbered with the costs and expenses of such litigation and the delays incident to final determination and the chances of different adjudications by different jurisdictions;

4. Of the probable loss or interference with the performance of Government contracts (and other existing contracts) for the production of products for the national defense;

5. Of the probability of cessation in work, and losses and damages and ill feelings by reason of labor disturbances, which will almost inevitably follow if the plaintiff fails to comply with the present illegal and erroneous opin-

ion of the Administrator; or if in attempting to comply it is forced to insist on a reduction of the compensation now being paid its underground employees;

6. Of the necessity of reaching or attempting to reach new collective bargaining contracts with the labor organizations, the provisions of existing contracts being abrogated, if the illegal and erroneous opinion of the Administrator or the assertions of the defendants are adhered to;

7. Of the great expense that the plaintiff will be put to in changing its operations from the "working place to working place" plan to the "portal to portal" plan, in the event by reason of the Administrator's opinion and the perils of not complying therewith it feels compelled to endeavor to comply therewith;

8. Of the claims of the different individual employees and the different classes of employees, being so different as to impose upon the plaintiff the perils and uncertainties incident to different contentions, and adjudications in reference to the legal issues herein sought to be declared.

## VIII.

### Perils of Decision.

Unless the plaintiff can obtain a prompt declaration on the issue of law here presented, it is confronted with unusual and immeasurable perils of making a decision because—

1. If it, under advice of counsel, decides to stand by its construction of the law, and the Court should ultimately decide that the assertions either of the Administrator or of

individual employees or any of the classes of plaintiff's employees are correct, plaintiff would be subjected:

A. To the costs, expenses and heavy penalties which would be imposed under Section 16(b) of the Act.

B. To the penalties of fine and imprisonment imposed by Section 16(a) of the Act.

C. To having the Administrator, under the warning given in his opinion of March 23, 1941 (Exhibit "A" hereto attached) proceed against it by injunction proceedings under Section 17 of the Act, and the prevention of the shipment in interstate commerce of its manufactured products.

D. To undergoing the perils incident to its defense and other contracts.

2. If, on account of the perils incident to standing on its conviction under advice of counsel, it feels impelled on account of the uncertainties and delays of litigation to accept and comply with the opinion either of the Administrator, or with the demands and assertions of defendants, plaintiff will probably, and in many respects certainly, be subject to or have imposed upon it (among other things):

A. The payment of large sums of money to its employees for overtime as contended for by them.

B. The planning and institution of new methods of operation which will result in great loss and damage to the plaintiff because—

(a) compliance will result in a large reduction in production if the "portal to portal" plan should be put in

effect and the underground employees could not remain underground more than eight hours per working day, which would mean that the time spent in going to and from the working places or from the bathhouse would have to be subtracted from the time now spent in actual work at the actual working places, thereby reducing the actual day's work time from eight hours to five hours or six hours, depending upon the correctness of the contentions of the various classes of employees.

As an illustration, plaintiff has calculated what the effect of putting the opinion of the Administrator into effect at one time of its typical ore mines would be. Under such ruling, the time schedule would be as follows:

Starting time (report at the portal) 6:00 o'clock A. M.

Lunch period (excluded under the Administrator's opinion) 30 minutes.

Time that men must reach the portal at end of day's work 2:30 o'clock P. M.

Total Workday 8 hours.

Accurate tests show that it requires forty minutes to get all of the men out of the mine at the end of the day's work. Since all men must be checked out at the portal at 2:30 P. M., the plaintiff will have to start hoisting men at 1:45 P. M. and in order to reach the underground man loading station the men will have to leave the working places not later than 1:30 P. M. As a result of this operation, which will probably have to be put in if the Administrator's ruling is adhered to, the first 35 men (at this typical mine) going out would have a loss of working time at their working places of 23½ minutes; the second 35 a loss of 35½ minutes; the third 35 a loss

of 47½ minutes; the fourth 35 a loss of one hour and one-half minute; and the fifth 35 a loss of one hour and 19½ minutes, and said loss continuing to increase as the number of mantrips increases.

The loss of working time would be much greater if the employees' contention that time spent in going to and from the bathhouse, the time spent in transportation from portal to portal and the thirty minutes lunch period are included as a part of the workday for which they should be compensated.

On the basis of loss of production as estimated by the plaintiff, the installations of the "portal to portal" system would mean a loss on an annual production of 4,320,309 net tons of iron ore and limestone (plaintiff's 1940 production) of 381,324 tons.

(b) There would be a large loss in wages paid to the employees: If the "portal to portal" system were put into effect it would mean the revaluation of the company's present hourly rates. Its present wage rates are based on a systematic evaluation of the job, taking into consideration the skill, physical effort, mental effort, fatigue, etc., involved. These rates are based on eight hours of work in and about the usual places of work, and, therefore, if the traveling time is deducted from the productive labor time, and added to the non-productive time, the wage rates would be substantially reduced. The amount of time worked by the producing crews, in which to get their base production under the incentive plan, which is now in operation, would be greatly lessened.

In 1936 the plaintiff, after careful consideration and several years studies and surveys, adopted and put into effect its incentive wage plan. Under this plan the miner is paid a guaranteed minimum wage, and in addition receives a bonus over and above the guaranteed minimum, depending upon the amount of production. In 1940, the

plaintiff paid out to mining employees above the guaranteed wage the sum of $282,162.18, which represented the bonus paid under the incentive plan.

If the time of work at the usual working places is reduced from eight to six or less actual hours (this apparently will be necessary because increase in cost would become prohibitive if the present and contracted for eight hours per day work at the working place was changed to six hours compensated work with payment of time and one-half for the additional two hours of overtime spent in going to and from the working place), the earnings under the incentive plan will be greatly reduced, if not altogether eliminated.

The incentive plan is functioning with the approval and full cooperation of all the employees, and its terms were embraced in and formed the basis of the existing working contracts between the plaintiff and the two labor organizations.

(c) It would materially increase the cost of the plaintiff's manufactured products into which practically its entire iron ore production enters.

Based on the figures for the year 1940, this loss for that year would have been as follows:

| | |
|---|---|
| Total ore mines, year 1940 | 4,320,000 tons |
| Loss at 8-1/3% in production if iron ore (the loss that would result from including transportation time as indicated by tests and surveys of plaintiff) | 360,000 tons |
| Tons of iron ore required per ton of pig iron | 2.6875 tons |
| Tons of pig iron manufactured from 360,000 net tons iron ore (360,000 -:- 2.6875) | 133,950 tons |
| Tons ingots manufactured from this pig iron | 155,750 tons |
| Tons finished product manufactured from above ingots | 111,200 tons |

The 111,200 tons of finished productions represent the actual loss in tonnage in manufacture of finished productions which would be caused by the loss of production in iron ore of the 360,000 tons.

(d) It would greatly increase plaintiff's cost per ton of ore produced.

(e) It would place the plaintiff at a serious disadvantage with its competitors and would deprive it of a substantial portion of its existing markets.

(f) It would void the existing written contracts between plaintiff and the Locals of the two labor organizations, thereby rendering necessary negotiations for new contracts and disturbing the harmonious relations that exist between plaintiff and its employees under the operation of the existing contracts;

(g) The plaintiff has placed itself subject to the call of national defense, and based upon the requirements of national defense, has already contracted for or indicated it will have to increase its annual production approximately twenty percent above the 1940 production figures. It would be difficult, if not impossible, to meet this requirement if the present "working place to working place" system were changed. Said defense contracts as to costs were based upon the existence and continuance under the existing contracts of the "working place to working place" plan.

(h) The plaintiff's cycle of operations, computation of wages, payment of wages, methods and forms of bookkeeping, rules and regulations governing employees, method and time of transportation, assembly and delivery of tools, powder and equipment, and activities of service

and surface crews have all been by long and unvaried custom and written contracts with the labor organizations, related to and based upon the "working place to working place" plan, and to change this method would be difficult and costly.

## IX.

### Great Weight Should Be Accorded to Any Reasonable Standards Which Represent the Prevailing Custom and Practice in the Particular Industry, and Which Are Supported By a Long History of Bona Fide Collective Bargaining Agreements.

The reasonableness of plaintiff's contention is supported by the following, among other, facts:

1. It has been for more than fifty years the unvarying and continuous custom in plaintiff's ore mines, as well as in all other ore mines in Alabama, for the wages of underground ore miners to be computed and paid on the "face to face" basis.

2. It has been for more than fifty years the unvarying and continuous custom in plaintiff's ore mines, as well as in all other ore mines in Alabama, that underground ore miners should not have their wages computed or paid for the necessary time in going from and to the surface and to and from their underground working places.

3. The same unvarying and continuous custom, as set forth in 1 and 2 above, has for more than fifty years existed in all underground coal mining operations of the plaintiff and of all other coal operators in the State of Alabama.

Plaintiff alleges that there can be, under conditions existing in the State of Alabama, no logical or possible

differentiation between underground ore mines and underground coal mines, so far as the question under consideration is concerned.

4. The plaintiff, both prior and subsequent to the passage of the Act, has negotiated and executed with the defendant's Mudcoda Local Number 123, Wenonah Local Number 157 and Ishkcoda Local Number 153, contracts governing wages, hours of service and other conditions of employment, and each of these contracts, signed by the duly authorized representatives of the respective locals, who were duly authorized to act for and in behalf of all of plaintiff's underground employees who were members of such locals, contained the following provision:

"There shall be established an eight-hour day and a forty-hour week; time and one-half shall be paid for all overtime in excess of eight hours in any one day, and for all overtime in excess of forty hours in any one week. The eight-hour day means eight hours of work in or about the mines at the usual working places for all classes of labor, exclusive of the lunch period, whether they be paid by the day or be paid on the tonnage basis."

5. The plaintiff, both prior and subsequent to the passage of the Act, has negotiated and executed with the Muscoda Local Number 21935, Wenonah Local Number 21936, Ishkooda Local Number 21937, Red Ore Miners Union, or the labor organization which it succeeded or took over, contracts governing wages, hours of service and other conditions of employment, and that each of these contracts, signed by the duly authorized representatives of the respective locals, who were duly authorized to act for and in behalf of all of plaintiff's employees who were members of such locals, contained the following provision:

"There shall be established an eight-hour day and a forty-hour week; time and one-half shall be paid for all overtime in excess of forty hours in any one week. The eight hour day means eight hours of work in or about the mine at the usual working places for all classes of labor, exclusive of the lunch period, whether they be paid by the day or be paid on the tonnage basis."

6. The written contracts containing the above-quoted provisions are now in full force and effect and have been since, to-wit, May 31, 1937.

7. Written contracts executed between the plaintiff and Locals of the United Mine Workers of America, containing an exactly similar definition of the workday as meaning "hours of work in or about the mines at the usual working places", have been in existence since, to-wit, May 2, 1934.

8. Written contracts executed between the plaintiff and Locals of the Red Ore Miners' Union, affiliated with the American Federation of Labor (or their predecessor unions), containing an exactly similar definition of the workday as meaning "hours of work in or about the mines at the usual working places", have been in existence since, to-wit, May 31, 1937, and are in existence at the present time.

9. The opinion (and enforcement thereunder) of the Administrator in reference to the bituminous coal mines is inconsistent with his opinion in reference to the iron ore mines.

10. The previous statement and interpretation of Section 7 of the Act by the Administrator are inconsistent with his present opinion in reference to the iron ore mines.

11. The laws of the State of Alabama during all of the period of time herein referred to have recognized in garnishment proceedings, wage suits, and other related matters, that the payment and computation of wages in underground mines should be on the "face to face" basis.

## X.

### Contractual Obligations.

Plaintiff, on or about the 31st day of May, 1937, negotiated and executed in good faith written contracts with the defendant locals of the International Union of Mine, Mill and Smelter Workers and the defendant locals of the Red Ore Miners Union. Said contracts are in full force and effect, and are fully functioning at the present time. Copies of said contracts are hereto attached, marked Exhibit "C", and made a part hereof.

In the negotiation and execution of said contracts, the "working place to working place" definition of the workday constituted a part of the consideration for the execution of said contracts on the part of the plaintiff. The members of the unions have, since the execution of the contracts, accepted and are continuing to accept the benefits accruing to them under said contracts, and have held and are continuing to hold the plaintiff obligated by their terms and provisions. Said contracts were executed by the unions with full knowledge of the enactment of the Act and with the knowledge and understanding that in consideration of benefits given them under said contracts they were waiving and surrendering the contention they are now making. Plaintiff asserts that so long as said contracts remain executory, the members of the labor organizations who executed them are bound by the terms thereof, including the agreement therein contained as to what constitutes the workday and "workweek". Said de-

fendants are estopped from asserting or maintaining their present contention that, in conflict with their solemn written contracts, they be paid for time spent in going to and from their working place.

XI.

Petition and Prayer.

Wherefore, Plaintiff petitions and prays this Court to make and enter a decree and judgment declaring the rights of the respective parties hereto in the premises and more particularly plaintiff's rights as asserted in the following specific propositions:

A.

Has the plaintiff, in following the work schedule and procedure as hereinbefore in Section *II* hereof set out, complied with the provisions of Section 7 of the Act?

B.

Did the Congress in the enactment of Section 7 of the Act intend that the "workweek" should consist of the time actually spent by the underground employees of the plaintiff working at and around their usual working place?

C.

Did the Congress in the enactment of Section 7 of the Act intended that the "workweek" of plaintiff's underground employees should include any portion of their time spent in being transported or walking to and from their usual working places and while not engaged in any physical work or service for the plaintiff?

D.

Is the plaintiff indebted in any sums to its underground employees for the time spent by them at any time since the enactment of the Act and embracing (without any physical work or service for the plaintiff being done during such time)—

(a) Any time spent in the bathhouse;

(b) Any time spent in going from and to the bathhouse to and from the portal;

(c) Any time spent in being transported from and to the portal to and from the underground manloading station;

(d) Any time spent in walking to and from their usual working places from and to the underground manloading station;

(e) Any time during the thirty minute lunch period?

E.

What did the Congress intend insofar as the method of operation of plaintiff as hereinbefore in Section II hereof set forth are concerned by the use of the word "workweek"?

F.

Are the assertions of the plaintiff as herein set forth as to the intentions of the Congress in the use of the word "workweek" legal and correct?

Premises Considered, Plaintiff petitions and prays that the Court adjudge and answer, separately and severally, each of the questions specifically set forth in the above paragraphs numbered A to F, both inclusive, and determine and declare that the plaintiff is not indebted to the defendants and its underground mining employees as compensation for any time spent by them since the enactment of the Act in the bathhouse or in going from and to the bathhouse to or from the portal or to and from the underground man loading station from or to the portal or to and from the actual working places of the employees from or to the underground man loading station, or the thirty minute lunch period (during which time said employees performed no physical labor or service in connection with their actual work), and that said defendants and their agents, representatives and all underground employees of the plaintiff made parties defendant hereto as a class to restrained and enjoined from prosecuting any suit or claim of any nature whatsoever against plaintiff for any additional wages or compensation claimed to be due them under the terms and provisions of the said Act for any portion of their time spent as above set forth, and plaintiff prays for a general declaratory judgment with reference to the questions presented by this petition, and a judgment against the defendants for costs herein, and if the plaintiff be mistaken in the relief prayed for, plaintiff hereby prays for such other, further, more different or general relief as to the Court may seem meet, just and proper, the premises considered.

Plaintiff prays that in accordance with rule 57, District Courts of the United States, the Court order a speedy hearing of this action and advance it on the docket.

## XII.

### Alternative Prayer.

If for any reason this Court should decline to take jurisdiction hereof under the provisions of the Federal Declaratory Judgment Act (Section I(g) hereof), plaintiff in the alternative prays that this Court assume, take and exercise equity jurisdiction because of the existence of the facts herein alleged which confer upon said Court such equity jurisdiction in that it, separately and severally, appears therefrom that such jurisdiction should be exercised because:

(a) It is essential to the protection of the rights asserted by the plaintiff herein;

(b) It is essential to secure a determination of the question arising hereunder a law regulating commerce;

(c) It is essential to the protection of the plaintiff from the costs, expense, inconvenience and vexation of a multiplicity of suits;

(d) It is essential to protect the plaintiff against irreparable damage;

(e) It is essential to protect the plaintiff against the penalties of an Act of the Congress through an illegal and improper application of the provisions of such Act.

(f) It is essential to protect the rights of plaintiff on account of the inadequacy of any remedy at law;

(g) It is essential for the determination of plaintiff's assertion that defendants are estopped by the terms of their written contract and by their conduct from assert-

ing their claims for compensation for time (including the lunch periods) in going to and from their places of work;

(h) It is essential to determine plaintiff's claim for and to grant plaintiff a specific performance of defendant's written contract;

Wherefore, Plaintiff prays that this Court will issue a temporary restraining order or preliminary injunction restraining and enjoining said defendants and their agents and representatives and all underground mine employees of the plaintiff made parties hereto as a class from instituting, maintaining or prosecuting any other action or proceeding to determine the rights of this plaintiff or of the defendants under the averments of this bill of complaint, and that each of said defendants be required to propound and assert their respective rights, if any they have, to this Honorable Court; and plaintiff further prays, separately and severally, that on final decree it be ordered, adjudged and decreed by the Court:

1. That plaintiff is not indebted to any of its underground mine employees in any sum under the provisions of the Fair Labor Standards Act of 1938;

2. That defendants are not entitled to recover from plaintiff any compensation under the provisions of the Fair Labor Standards Act of 1938;

3. That plaintiff is not indebted in any sums to any of its underground mine employees for the time spent by them at any time since the enactment of the Act and embracing (without any physical work or service for the plaintiff being done during such time)—

(a) Any time spent in the bathhouse;

(b) Any time spent in going from and to the bathhouse to and from the portal;

(c) Any time spent in being transported from and to the portal to and from the underground man loading station;

(d) Any time spent in walking to and from their usual working places from and to the underground man loading station;

(e) Any time during the thirty minute lunch period.

4. That defendants are estopped by their written contract and by their conduct from asserting any claim for or recovering any compensation for time spent in going to and from their places of work;

5. That plaintiff is entitled to the specific performance of the written contract between plaintiff and the defendants;

6. That plaintiff go hence with its reasonable costs herein incurred;

7. That the temporary injunction be made permanent.

Plaintiff submits itself to the jurisdiction of the Court and offers to do full equity.

BENNERS, BURR, McKAMY & FORMAN,
By BORDEN BURR,
Attorneys for Plaintiff.

50 VERIFICATION.

State of Alabama,
Jefferson County.

This day personally appeared before me, a Notary Public in and for the above named State and County, C. E. Abbott, who, being first duly sworn, on oath deposes and says that he is the Vice-President in charge of Raw Materials of the Tennessee Coal, Iron & Railroad Company, a corporation, named as plaintiff in the foregoing petition; that as such officer he is authorized to make this affidavit; that he has read over the facts therein set forth; that he is familiar with the facts as therein stated, and that said facts as therein stated are true, except where stated on information and belief, and where so stated he verily believes the same to be true.

C. E. ABBOTT.

Sworn to and subscribed before me, on this the 3 day of April, 1941.

MARGARET KENNEDY,
(Notarial Seal) Notary Public.

Filed April 4, 1941.

51 EXHIBIT "A".

For Release Sunday R-1315
March 23, 1941 (Revised)

U. S. Department of Labor
Wage and Hour Division.
Washington.

Modified Portal to Portal Wage-Hour Opinion Announced.

Following informal fact-finding conferences on metal mining practices held in Salt Lake City and Birmingham

before Harold Stein, Assistant Director of the Hearings Branch, General Philip B. Fleming, Administrator of the Wage and Hour Division, U. S. Department of Labor, announced today a modified portal to portal Wage-Hour opinion.

A summary of this opinion, contained in a report by Mr. Stein follows:

"The workday in underground metal mining starts when the miner reports for duty as required at or near the collar of the mine, and ends when he reaches the collar at the end of the shift.

"The workday also includes the aggregate of the time spent on the surface in obtaining and returning lamps, carbide and tools, and in checking in and out.

"The workday does not include any fixed lunch period of one-half hour or more during which the miner is relieved of all duties, even though the lunch period is spent underground."

The practices of the metal mining industry are so unusual that Administrator Fleming has frequently been asked to express his opinion as to the application of the general principles of determining "hours worked" to certain factual situations typical of underground metal mining. In order to base his answers to these requests on the fullest possible knowledge, an investigation was conducted including field surveys and questionnaires, reports by the Division's Regional Directors, and public conferences before Mr. Stein at Salt Lake City December 11-12, 1940, and Birmingham, January 14-15, 1941. Many supplemental statements and briefs were also filed by employers, their associations, and by unions.

The present report, on which the modified portal to portal wage-hour opinion is based, was prepared from his full record. It consists of an application of the basic principles contained in Interpretative Bulletin No. 13 of the Wage and Hour Division to the typical situations in underground metal mining. The report was reviewed and approved by the Solicitor of Labor.

In describing the practices of the industry, Mr. Stein found that work time has been computed on four different bases in different mines and with many minor variances in other mines. Mr. Stein concluded that the continued acceptance of these inconsistencies would be directly contrary to the purposes of the Act. It would also make useless the establishment by Congress of a national 40 hour standard if the standard was to be applied on a different basis in each instance.

In announcing his acceptance and approval of the report, General Fleming stated that the enforcement of the wage and hour law in the underground metal mining industry will be based on the principles contained in the report, effective April 1, 1941. General Fleming announced, however, that because the Division had not heretofore taken a definite stand on the various problems involved, it would not seek to compel the payment of restitution from mine owners who have been operating on a face to face or other bases inconsistent with the principles outlined in the report. This enforcement policy of the Division cannot, however, interfere with the rights of employees or their representatives to sue under Section 16(b) of the Fair Labor Standards Act.

54 EXHIBIT "A".

For Release Sunday
March 23, 1941 G-133

U. S. Department of Labor
Wage and Hour Division
Washington.

Report on "Hours Worked" in Underground Metal Mining.
March 15, 1941.

Introduction.

Section 6 of the Fair Labor Standards Act requires employers to pay those of their employees subject to the act at the rate of "not less than 30 cents an hour."[1]

Section 7 of the act requires that employers shall not "employ" such employees "for a workweek longer than forty hours" unless the overtime penalty is paid.[2]

Section 3(g) of the act defines "employ" as including "to suffer or permit to work".

The Administrator has no statutory authority to define the words quoted above. Nevertheless, in response to many inquiries, he has found it desirable to indicate publicly his own interpretation of these words (and other parts of the statute) and to explain to the public the legal principles he considers applicable. The statement of the Administrator's opinion on "hours worked" is to be found in Interpretative Bulletin No. 13 of the Wage and Hour Division. This bulletin is not a binding ruling, but it does serve to advise interested parties as to the

[1] Since October 24, 1939.
[2] Since October 24, 1940.

Administrator's view of the requirements of the act, and to indicate how he will proceed in the execution of his statutory responsibilities.[3]

While the general principles outlined in Interpretative Bulletin No. 13 can usually be applied without further interpretation or explanation, the practices of the metal mining industry are so unusual that the Administrator has frequently been asked to express his opinion as to the application of these general principles to certain factual situations typical of underground metal mining. In order to base his answers to these requests on the fullest possible knowledge, an investigation has been conducted, including field surveys and questionnaires, reports by the Division's Regional Directors, and public conferences before the undersigned at Salt Lake City, December 11 and 12, 1940, and Birmingham, January 14 and 15, 1941. Many supplementary statements and briefs have also been filed by employers and their associations and by unions. The present report is based on this full record.

## II.

## The Miner's Day.

Although there are many minor local and personal variations, it is possible to describe in some detail the general pattern of the underground miner's day. The controversial questions arise primarily in connection with the determination of hours worked by employees engaged in extraction proper—drilling, blasting and mucking and related occupations. Their work includes the removal of the ore from

[3] While the Wage and Hour Division Bulletins are not binding on the courts, it may be anticipated that judges will accord them especial weight; see United States v. American Trucking Associations, Inc., 310 U. S. 534. The Administrator has also from time to time issued statements concerning enforcement policy under which he proposes to proceed for reasons of administrative convenience.

the face and loading it on cars. In some mines these employees work one shift, in others two. There is seldom a third shift except for underground maintenance employees and other workers performing specialized tasks. Whether the miner works the day shift or the night shift, the general outline of his activities is much the same.

The miner begins his day by arriving on company property either on foot or by his own chosen conveyance. Whatever the method, upon arrival the miner normally goes first to the change house[4] where he removes his street clothes and puts on working clothes. Practically all large mines and many small mines nowadays provide a change house. The use of the change house by the miner is optional[5] and with rare exceptions free.[6] The time spent in the change house is variable but ten or fifteen minutes would seem to be not uncommon. For their own personal convenience some miners may arrive considerably before their shift is to begin and wait in the change house until starting time. Some miners, of course, change at home and do not have occasion to stop at the change house at all.

After changing his clothes the miner ordinarily walks to the portal or collar[7] of the mine to check in, stopping in on the way at the tool house to pick up tools and other small supplies and at the lamp house to pick up his electric lamp or to buy carbide. In some mines all tools and in many mines all large tools are taken into the

[4] The change house is variously called the dry, or wash house. Other similar variations in mining terminology are common. In this report no attempt is made to list all synonyms or similar terms.

[5] Only one exception to this is recorded: Affidavit of Henry M. Rives, p. 2.

[6] Some Alabama mines make a charge for the use of the change house: Memorandum Brief of Borden Burr, p. 23. The propriety of this charge under section 3(m) of the act is not discussed in this report.

[7] The opening into a mine which is entered by a level or inclined tunnel is called a portal and to a mine entered by a vertical shaft a collar.

mine for the miner as a matter of safety. When carbide lamps are used the miner has the option of purchasing the carbide at the lamp house on mine property or elsewhere at his convenience.[8] When the mine supplies electric lamps the miner is required to obtain his lamp at the lamp house before descending into the mine.[9] Usually the lamp house and tool house are located close either to the change house or to the portal. Thus, the additional time consumed by the miner in obtaining tools or carbide or lamps is only two or three minutes on an average beyond what it would otherwise take him to go from the change house to the portal. Near the portal of the mine the miner checks in, although occasionally as a matter of convenience checking in may be performed near the change house. The check-in is a matter of safety rather than of time keeping. By the use of some device such as a board and metal discs the mine superintendent or his subordinates are able to tell at a glance what men are working below in the mine and also can tell what crews of men are incomplete and need substitutes when the day's work is about to start. The actual checking in normally takes only an instant per man, but it may take a few minutes for a whole group of men to check in.

The descent into a mine, if vertical, is by a cage. If the adit is inclined, the descent is made by a train or skip or on foot. Descent by conveyance is normal in large mines, and almost universal in deep mines. Descent on foot is common in small and shallow mines reached by an easy incline.

When the miner goes in on foot, there is usually no waiting time after he checks in at the portal. Otherwise there is normally some wait for the cage or man-

[8] The propriety of this charge under section 3(m) of the act is not discussed in this report.

[9] An electric lamp must be picked up each working day; carbide is obtained only two or three times a week.

trip depending on the number of men and the available transportation facilities. This wait may be only a minute or two or it may be as much as twenty or thirty minutes. The descent down to the unloading station in the mine seldom takes more than five or ten minutes. Upon arrival at the first unloading station some or all of the men descent from the conveyance. In many mines no further transportation is provided and all the underground miners walk from the loading station to their working places, some nearby and some a considerable distance away. In other mines further transportation is provided part or all the way into the mine. In any event the miners proceed without delay to their working places, stopping only to pick up tools and supplies where necessary. Most of the maintenance men and special workers such as hoist tenders, etc., usually start their physical work close to one of the stations on the underground transportation system and thus as a group are ready to begin these operations shortly after arrival underground. The time required to reach the working point for the actual miners varies with the distance from the station to the working face, the method of transportation and the difficulties of the terrain. In a large mine the distance may vary from a comparatively few yards for some working faces to over two miles for others. Furthermore, the men are generally assigned to the various working faces by the management. The actual elapsed time from arrival at the first station in the mine to arrival at the working face will thus vary in different mines and for different miners in the same mine from five minutes or less to an hour or more. An average travel time of twenty to thirty minutes is common.

After arrival at the working face miners begin work and continue until the lunch period. In a few mines there is no fixed lunch period and the men snatch a bite to eat

from time to time during the day.[10] In most mines, however, it is customary to have a set lunch period, usually of half an hour, although occasionally of one hour. Except for those mines where the miners work fairly near the surface and are able to walk out of the mine easily, lunch is eaten underground. The miners ordinarily congregate at some convenient place not far from their working face. In a number of mines heated or dry places and lunch tables are provided. In general, however, the lunch is brief, at or near the workplace and without formalities or conveniences that would interfere with an instant return to work. Working arrangements are such in the great majority of the mines that the day's work ends with blasting. The men then proceed in the same way they came in to the station nearest the exit from the mine and are then hoisted to the surface, or walk out, if they walked in. At the surface they check out, return their lamps to the lamp house and proceed to the the change house. No stop is necessary at the lamp house for carbide and generally the miners leave their tools underground so that they do not have occasion to stop at the tool house; thus the required stops prior to going to the change house may not take more than a few seconds or at the most a minute or two. Time spent at the change house is approximately the same as before the day's work begins except that the washing usually takes a little longer.

The general movements thus described are thoroughly characteristic of underground metal mines throughout the country, except that in the smaller mines and in more easily accessible mines there may be far less formality about the above ground procedure. The miners may dress at home and walk direct to their working

[10] Most Alabama mines have no set lunch period: Memorandum Brief of Borden Burr, p. 42.

faces in the mine without checking in and without reliance on any form of transportation on the mine property. Furthermore, there are certain continuous shift operations underground. It is the custom in such instances for the workers to replace each other at the actual working place underground which is normally adjacent to one of the transportation stations. In this instance the relief worker descends in the cage or mantrip and the man he is relieving immediately ascends to the surface. Such workers usually have no certain lunch period even though there may be lunch periods for the others workers in the mine. There are also some workers such as carpenters who work partly on the surface and partly underground. Their hours are usually arranged like those of the other surface workers and they start their duties on the surface.

By and large the miner has what is called an eight-hour day.[11] According to the method of computing the shift, as will be explained below, this eight-hour day may include only the time at the working face exclusive of lunch or may include all underground time, or may have some intermediate base.

## III.

### Time Bases for Wage Payments.

Traditionally the metal miner has been paid on a shift basis. In the old days the shift was commonly measured by the completion of a certain round of work and in many mines there was no precise account kept of the time in-

[11] During the past two years, some mines have changed from six eight-hour shifts per week to six seven-hour shifts. In a few mines a shorter "face to face" shift has been fixed by collective bargaining, apparently as a rough equivalent of an eight-hour "collar to collar" shift.

volved. Before the days of change houses and the safety check-in, and particularly in new and shallow mines, the miner's arrival on mine property would be practically coincidental with his commencement of physical labor. As mines extend farther underground, and as the pre-mining activities on the surface increase, the time interval between arrival on company property and the commencement of physical labor likewise increases. The desire for shorter hours and the necessity for a more precise measurement of the working day were slow historical developments. Unlike advances of unionization, varying state laws, differing management methods and rules, and differing personnel policies have led to a variety of methods of computing time for pay purposes in underground metal mining. These can be summarized as follows:

(1) *Face to face.* The miners are paid only for working time at the face and excluding lunch. Except where the shift was measured only by the work performed, this is probably the oldest method of computing the shift, but the record indicates that only a small percentage of underground metal miners are still paid on this basis.[12] The only important group of mines now operating on a face to face basis are those in Alabama.

(2) *Collar to collar.* Far more common than face to face in modern practice, and universal in the states of Utah and Arizona, where it is required by law, is the

[12] See Memorandum on Measurement of Working Time in Underground Non-ferrous Metal Mines, Research and Statistics Branch, Wage and Hour Division, December 7, 1940. Out of 115 reporting mines, with 22,301 employees, only four employing a total of 74 employees operated on a face to face basis. The 115 reporting mines are not a representative sample of all metal mines, or even of all non-ferrous metal mines. However, since the sample is overweighted with large mines having many employees, the sample is fairly accurate at least with respect to the number of miners. Furthermore, since underground travel time is normally not great in small mines the practical effect of using the different methods is comparatively unimportant in small mines except for lunch period.

collar to collar basis. On this basis, the miner is paid for all time from the moment he descends from the surface to the moment he returns to the surface, except that in some mines the lunch period is not paid for. Characteristically, though not invariably, the collar to collar shift is eight hours. Ordinarily lunch is eaten on the company's time, but a fixed lunch period is normal, nevertheless.

(3) and (4). In on Company Time, Out on Men's Time. Out on Company Time, In on Men's Time.

In a very large number of mines the men are paid from the time they leave the surface until the end of the physical work at the face. They are not paid for the time spent in returning to the surface. In another large group of mines, pay time begins at the face and ends at the surface; this is required by state law in Nevada. Under both these ystems the lunch period is normally taken on the men's time, although occasionally it may be on company time.

(5) *The Anaconda System.* The system used by the Anaconda Copper Mining Company and many other mines, especially copper mines, is to pay the men from the time they leave the surface until they reach the underground loading station on their way out at the end of the day. Lunch period is not paid for nor are the miners paid for the time spent in waiting for the mantrip up and for the actual hoisting time.

6. *Lunch Period Variants.* As has been stated above, most miners have a fixed lunch period. The lunch period, when taken underground, is generally paid for on the collar to collar system, never on the face to face system, and sometimes, though usually not on the intermediate

systems. When lunch is eaten above ground, the men are paid for the time spent in going to and coming from the surface, but are not paid for the lunch period proper.

(7). *Other Variants.* Generally speaking underground miners are not paid for time on the surface, except that they are occasionally paid for the time they wait at the portal of the mine, after the shift has begun, before they find room in a descending mantrip. Similarly, men may be paid up to an official quitting time even though they reach the surface on a mantrip that arrives before the official end of a shift.[13]

(8) *Other State Laws.* As stated above, collar to collar payment and a maximum of eight hours (except in case of emergency and except for certain maintenance employees) is fixed by statute in Utah and Arizona. Eight hours excluding lunch but including the time spent in returning from the face to the surface is fixed in the Nevada statute. Alabama and Tennessee fix no limitation on hours. In Montana and Colorado the proper interpretation of the eight hour laws is disputed or in litigation. In other important metal mining states, the statutes either in terms or by judicial interpretation limit only the hours of physical work at the face.

From the foregoing summary it is apparent that there is no nation-wide practice concerning hours worked in underground metal mines. In a few localities, the practice is fairly uniform, but generally it varies greatly even within the boundaries of a single state. Furthermore,

[13] In one large mine paid time begins at a station more than two miles away from the actual portal of the mine and ends at the same place; men who live or drive to a station near the actual portal appear to be paid from the time the train leaves the outer station; Brief of Alaska Juneau Mining Company, pp. 3, 4. In one I. U. M. M. S. W. contract the men are paid "to the change house": Salt Lake City Conference, T. p. 133.

existing methods of payment have been arrived at in part by state laws, in part by collective bargaining and in part by unilateral employer action. The general tendency has been toward a shorter day, and toward an inclusion of more elements of the day within the period of time for which payment is made. The great majority of metal miners nowadays work in mines where they are paid for part or all of their underground travel time.

## IV.

### Opposing Contentions and General Considerations.

The International Union of Mine, Mill and Smelter Workers, affiliated to the C. I. O., contends that the miners should be paid from the moment they leave the bathhouse at the beginning of the shift until the moment they enter the bathhouse at the end of the shift. The Federal labor unions affiliated to the American Federation of Labor contend that the miners should be paid for all time consumed from the moment they enter the bathhouse at the beginning of the shift to the moment they leave the bathhouse at the end of the shift. The basic contention of most employer representatives is that the miners should be paid for the time spent in so-called productive work at the working face or alternatively that the miner should be paid in accordance with the local custom and tradition, i. e., the method of payment that is customary in a group of mines or in all mines within a single state or possibly in each individual mine. It will be more convenient to consider the employers' contentions first.

Generally speaking, the employers who contend that the miners should be paid only for time at the working face base their argument primarily on the theory that it is only

this part of the day from which the employer derives any benefit. They also cite the terms and interpretations of numerous state 8-hour laws, with which certain exceptions have been construed as applying only to such time. They also state that it is impossible to shorten the time allotted to drilling, blasting, and mucking without seriously disrupting the operations of the mine, reducing profits, and generally interfering with the healthy development of the industry, including the welfare of the employees thereof. In support of their contention they cite the language of the Fair Labor Standards Act particularly to the definition of the word "produced" in section 3(j), asserting that this definition indicates that only productive work should be counted as "hours worked" under the act. They also cite what they consider both the dictionary and the ordinary application of the term "hours worked" as indicating that "hours worked" should apply only to the so-called production hours at the face. These arguments overlook the fact that the phrase "hours worked" does not appear in the act. The question is: when is the miner acting in the capacity of employee? The answer to this question must be found in the meaning of such words as "employ", "employee", and "produced" and the general objectives of the act. Indeed these arguments represent an attempt to construe section 6 and section 7 without any true reference to the policy expressed in section 2. They shift from the employer to the employee any loss in productive hours occasioned by the working conditions, in spite of the employee's total inability to alter any of the factors in the situation to his advantage.

It is not necessary to dwell on the general economic considerations. Obviously Congress realized in passing the law that compliance with its provisions would require certain adjustments. Further, the assertions made about

loss in production occasioned by a collar to collar day are based on the assumption that all other factors affecting production will remain constant; however, it can be assumed that insofar as an adjustment may be necessary, all other factors will not remain constant as the mine operators allege. Indeed all other factors ordinarily do not remain constant when there is a change in one of the major factors involved in a total operation. An interesting and directly relevant illustration of this is to be found in the statement submitted by the Phelps-Dodge Corporation with reference to its United Verde Branch which operates a large mine in Arizona. The question asked in the questionnaire was the following:

"Total time spent at working face and an estimate of the minimum time required for completing a round of work."

In reply the General Manager of the corporation submitted the following:

"Average time spent at working face is 6 hours, 30 minutes. Minimum time required for completing round of work cannot be answered, as round of work are adjusted in accordance with the time available for performing them."

While the adjustment referred to will be more difficult in some cases than in others, it is the type of adjustment that normally and necessarily results from the enactment of any new piece of social legislation. Finally, it must be recalled that thousands of miners are employed by mine operators on the very basis which is described by other mine operators as prohibitive.

It is also not necessary to consider in detail the precedents established by state 8-hour laws and decisions

thereunder. No single one of the state statutes is worded like the federal statute nor does any have precisely the same purpose and intention. Those laws limit the underground workday by a flat limitation; the Fair Labor Standards Act tends to limit the total workweek by an overtime penalty. The state laws reflect the general opinion that a limitation of underground time is desirable; but they cannot be accepted as controlling on the particular points at issue here.

The basic decision to be made is whether in the light of the policy of the Fair Labor Standards Act, working time for the purpose of section 6 and section 7 is to be construed as merely the time in which a particular set of activities are performed or whether it should also include the time which the employee gives to his employer and in which his activities are prescribed by his employer's rather than his own needs and desires. The statutory language is necessarily non-specific on this point since the act was designed to cover hundreds of thousands of different factual situations; but a liberal construction is mandatory, since this is a law of general social application: see, for example, the opinion of the Circuit Court of Appeals for the Eighth Circuit in the Hawkeye case:

"The statute is remedial, with a humanitarian end in view. It is, therefore, entitled to a liberal construction."[13]

Thus the Administrator cannot accept the proposition that hours worked under section 6 and section 7 should include only the hours which the employer denotes as "productive." The general position of the Administrator is to the contrary. He has stated in Interpretative Bulletin No. 13 that "As a general rule, hours worked will

[13] Fleming v. Hawkeye Pearl Button Co. et al. (C. C. A.-8th) 113 F. (2nd) 52.

include (1) all time during which an employee is required to be on duty or to be on the employer's premises or to be at a prescribed workplace, and (2) all time during which an employee is suffered or permitted to work whether or not he is required to do so." A passing comment may be made in respect to the use of the word "workplace" in the Bulletin. The use of this word is obviously to be attributed to the fact that the bulletin referred to employment both at an employer's premises and also at any designated point away from the employer's premises; thus "workplace" is wider in its application than "employer's premises." In the mining industry the word "workplace" has a special meaning. It refers to the spot underground where the miner is actually engaged in drilling, etc., but this special significance cannot, of course, be given to the term as it is used in the bulletin. Within the meaning of the bulletin, the whole mine, and for certain operations, as will be seen, part of the above ground mine premises may and should be considered as included within the "workplace." Finally, this conclusion about the scope of hours worked is reinforced by a statement in paragraph 4 of the same bulletin: "hours worked are not limited to the time spent in active labor, but include time given by the employee to the employer even though part of the time may be spent in idleness.

From the foregoing it is evident that the basic interpretation of "hours worked" long since adopted by the Administrator is directly contrary to the contention urged by the mining operators who claim that hours worked should include only the so-called productive hours at the face.

The contention raised by many mine operators that the determination of hours worked should be controlled, if not on the face to face basis entirely, then by local

custom and agreement, originated no doubt in various informal statements made by the Administrator largely in connection with the bituminous coal industry. Thus a press release[14] was issued by the Division on July 27, 1940, with the heading "Two Mining Determinations Announced." In this release the Administrator announced "that on the basis of an inquiry submitted by the bituminous coal mining industry, the Wage and Hour Division in carrying out its enforcement duties in that industry will accord great weight to any reasonable standards for determining working time which represent the prevailing customs and practices in the particular industry and are supported by a long history of *bona fide* collective bargaining agreement. In view of the circumstances described by the industry in submitting its inquiry, Colonel Fleming announced that practice of computing working time on a 'face to face' basis in the bituminous coal mining industry would not be unreasonable . . . The administrator added that the determination in the bituminous coal mining industry should not be considered to apply to any mining operations where the traditional practice of computing hours worked differs from the custom in the bituminous coal mining industry."

Other public statements were issued dealing with this matter[15] and also with the consent decree in the *Cornucopia* case involving hours worked in a gold mine.[16] This decree contained a stipulation to the effect that underground travel time should be considered hours worked. These informal statements on the enforcement policy of the Division contained at least the implication that local custom and agreement would be given great weight in de-

[14] R. 928.
[15] See T-14, G-81.
[16] Fleming v. Cornucopia Gold Mines, a corporation, judgment entered May 3, 1940, U. S. District Court for the Western District of Washington, Northern Division.

termining hours worked in underground metal mining.[17] This conclusion cannot be maintained.

Metal mining is characterized by the absence of any single prevailing practice with respect to the determination of "hours worked." In fact there are at least four major widespread different methods of computing hours worked. The mine operators urge that this condition should continue. It is unnecessary to consider their arguments in detail because the arguments against a universal national standard in determining "hours worked" in metal mining would apply with equal force to the national 30 cent and 40 hour standards established in the terms of the act itself. Clearly it would have been useless for Congress to have established the national 40 hour standard for all employees engaged in commerce or in the production of goods for commerce if compliance with that standard were to be determined in each instance by a different method of computing hours worked. Reasons of common fairness and competitive equality require that the same principle be used in establishing the base in all cases in which there may be a question about determining "hours worked" or thereby determining compliance with the 40 hour week and the 30 cent minimum wage. In the words of section 2(a) of the act, non-compliance with the standards "constitutes an unfair method of competition in commerce."

Finally, it should be noted that a consideration of the problem "hours worked" in the bituminous coal mining industry does not fall within the scope of this report. Yet

[17] The confusion on this point has been increased by a misreading of the last sentence of paragraph 12 of Interpretative Bulletin No. 13, which deals with the situation where an employee reports to work or ends his work at some unusual location away from his usual place of employment. In that situation, of course, all relevant considerations, including local agreements should be considered in deciding whether the employee's travel to his home should be counted as hours worked.

assuming the correctness of the face to face method of computing hours worked in that industry, it should be instantly plain that the conditions on which the bituminous coal opinion were based are not to be found in metal mining. In bituminous coal the face to face method of computing hours worked has been in virtually universal existence throughout this country for many years. It is the fruit of collective bargaining not for particular mines or localities, but on a nationwide basis. On the other hand, as has been said above, in metal mining there is no single prevailing practice. Methods of determining hours worked vary from state to state and from mine to mine. In some mines the method used is the result of collective bargaining, in others it is not. Thus the opinion expressed about hours worked in the bituminous coal mining industry cannot serve as a precedent in the underground metal mining industry.

## V.

### Hours Worked in Metal Mining.

In the preceding section there has been a discussion of the principal contentions advanced by the mine operators with reasons why their contentions cannot be accepted in whole or in part. It is also believed that the contentions of the unions cannot be accepted in certain respects. However, it will be more convenient to consider these contentions in relation to the particular period of the mining day involved.

Generally speaking, under the act the workday begins where a man is required to report to his employer or for duty. Thus in paragraph 12 of Interpretative Bulletin No. 13 it is stated: "If a crew of workers is required to report for work at a designated place at a specified hour

and all the employees are then driven to the place where they are to perform work, the time spent in riding to such place should be considered hours worked. Similarly, the time spent returning from the place at the close of the day's work should be considered hours worked." The application of this principle to metal mining clearly requires that in all normal mining operations the workday should be considered as beginning at the collar of the mine which is the place where the employee reports ready for duty. Subsequent so-called travel time whether on foot or by cage or train is time devoted by the employee to the service of his employer; it is not subject to the employee's discretion or control and it is not for the employee's benefit. The contention that the inclusion of travel time as part of the workday or workweek logically requires the inclusions of travel time from the employee's home to the mine does not merit serious consideration. Generally speaking, the employee has choise as to where he lives and as to his method and time of reaching the mine. Once he reports at the collar, however, his destination and all his movements are controlled by his employer. In this connection it should not be forgotten that the employer customarily designates the particular working place in the mine for each employee and shifts employees from one place to another as he sees fit. It should also be noted that when employees must wait for a conveyance at the collar of the mine after they have reported for duty at the required time, such waiting time is, of course, time spent for the benefit of the employer and in no sense for the benefit of the employee. Under the act, the employer has the right to instruct certain of his employees to report later than others if the facilities for conveying the employees into the mine are inadequate to do so without a waiting period. In any event, this enforced idleness cannot be used "effectively in the employee's own interest."[18]

[18] Interpretative Bulletin No. 13, para. 4.

This finding that the miner's day begins when he reports at the collar of the mine is contrary to the claims advanced by the two unions. From all the evidence it appears that the bathhouse is a convenience furnished by the employer, usually free, for the benefit of the employees. In many mines, furthermore, there is no bathhouse at all and in mines where there is a bathhouse its use is optional. In view of these facts there appears to be no justification for finding that the employer should pay for time spent in the bathhouse. Similarly the time spent in walking from the bathhouse to the mine portal is consequent upon the employee's beneficial use of the bathhouse itself. So far as the employer is concerned the employee could report directly to the mine portal and some employees ordinarily do so. Under these circumstances, it is not reasonable to accept the claim of the A. F. of L. that working time begins at the moment the miner enters the bathhouse; nor is it reasonable to accept the contention of the C. I. O. that the day begins when the miner leaves the bathhouse. In both instances reference has been made by the unions to the rules for good conduct in the bathhouse and elsewhere on the mine premises, imposed by the company, as implying employer control, but these appear to be merely necessary safety rules which still permit normal relaxation and normal freedom, so that the miner does not thereby come on duty.

As has been stated above, before the miner reports at the collar ready to descend into the mine he may pick up tools, carbide, or a lamp, and he may receive instructions from his superior as to the day's work. The contentions of both unions were partly based on these factors. There appears to be no doubt that the time spent in each of these activities should be construed as "hours worked." However, each of them normally is extremely

minor and takes only a moment or two and the total seldom exceeds two or three to five minutes. Occasionally, for reasons of mutual convenience, the check-in may be made where the miner enters the bathhouse, rather than at the collar. Similarly, there is no universally prescribed order about picking up tools or lamps. However, because of the extremely minor nature of these operations it would appear unwarranted to state that the working day actually begins with the first such activity and includes all time thereafter. In the most obvious cases, for example, it would be unreasonable to hold that where a miner checks in and hour before he intends or is required to descend into the mine, the interval being spent in the bathhouse for his own convenience, the mine employer should pay him for all intervening time. The other situations are comparable. It would therefore appear proper to hold that the total time consumed in performing these operations should be considered within hours worked but that the total elapsed time from the first such operation should not normally be so considered. As a practical matter, a very minor allowance of time such as three to five minutes, after the official check-in and before the time that the men are actually required to report at the collar or portal will take care of this in all situations where it is more convenient to perform these minor operations prior to the check-in at the mine collar.

In view of the conclusions reached above that all travel time so-called, is part of the miner's workday after he once reports at the mine collar it is unnecessary to consider opposing contentions and conclusions in connection with the picking up of tools underground. At that point the miner is at the disposal of his employer, whether he spends all the time underground in reaching his assigned position or whether he spends part of it in picking up tools or supplies.

Both unions contend that the workday should include the lunch period. The mine operators contend in general that the lunch period should not be counted as part of the workday. In Interpretative Bulletin No. 13 this matter is left open:

"No opinion can be expressed at this time as to certain cases—e. g., employees engaged in mining or in working under high pressure—where by custom or agreement time spent eating meals is paid for as hour worked."

It should be pointed out, first, that in many mines the lunch period is not paid for. It may also be noted that in some mines there is no lunch period. In support of their contention, the unions refer to the fact that on occasion a miner may be instructed to defer or advance his lunch period on instructions from his superior. They also point out that on some occasions the miners may use their lunch period for obtaining tools or on other occasions they may not eat during the whole of the period. These contentions do not go to the heart of the matter. The question to be determined is whether or not a full lunch period of not less than one-half hour[19] should be considered as "hours worked." Obviously, if in any particular factual situation the lunch period is used for the benefit of the employer, as in getting tools, there is no lunch period and there is no problem involved. More basic considerations urged by the union are that the miner is subject to the hazards of his occupation and to the disadvantages and inconveniences inherent in being underground during the lunch period as well as during the rest of his time underground. There is much weight in these contentions. Even where lunch rooms are pro-

[19] The contention apparently advanced by some employer representatives that various brief periods of time taken out for a cigarette, etc., should be totalled and deducted from the workday is too frivolous to require comment.

vided underground the differences between such a lunch room and an ordinary restaurant on the surface are great indeed. Some of the hazards of underground employment continue and it is unquestionably less relaxation for a miner to eat underground than it would be to eat on the surface. His movements are necessarily limited and his opportunity for rest is constricted. However, these are matters of degree. In spite of these disadvantages there remains a sharp distinction on the one hand between the time when the miner is drilling, etc., or traveling to his place of work, and on the other hand, the lunch period. There is a considerable element of relaxation involved and except for safety restrictions the miner is free from supervision for the lunch period. Balancing these opposing considerations it is felt that the lunch period of one-half hour or more,[20] in general, to the extent that it is actually used as a period for lunch or relaxation, should not be counted as hours worked under the act.

In conclusion, it should be noted that the concept of the workday outlined herein (collar to collar, minus lunch, plus waiting time, etc., on the surface) is not exactly the same as any of the four major methods currently in use. This arises from the fact that all the major methods have one of two origins, or a combination thereof. Face to face represents a method of payment based on certain advantages to the employer; it excludes much time which clearly comes within "hours worked" under the Fair Labor Standards Act. Collar to collar, on the other hand, is not concerned primarily with a workday, as such, but with the time spent underground. The Fair Labor Standards Act is not concerned with underground time as such. Computation of time under the act, therefore, deviates

[20] A half hour lunch period appears to be the shortest lunch period customary in the metal mining industry, wherever any fixed period is allowed. In general, the Administrator does not consider it proper to deduct time out for any rest period of twenty minutes or less; see Wage and Hour Division release, R-837.

from the collar to collar basis, by subtracting the lunch period and adding certain surface operations.

## VI.

## Summary.

The workday in underground metal mining starts when the miner reports for duty as required at or near the collar of the mine, and ends when he reaches the collar at the end of the shift.

The workday also includes the aggregate of the time spent on the surface in obtaining and returning lamps, carbide and tools, and in checking in and out.

The workday does not include any fixed lunch period of one-half hour or more during which the miner is relieved of all duties, even though the lunch period is spent underground.

HAROLD STEIN,
(Harold Stein)
Examiner.

Approved March 17, 1941.

PHILIP B. FLEMING,
Administrator.

Signed at Washington, D. C., March 15, 1941.

RUFUS G. POOLE,
(Rufus G. Poole)
Assistant Solicitor in Charge
of Opinions and Review.

79 EXHIBIT B.

Bessemer, Alabama, October 12, 1940.

In Re: Muscoda Local No. 123 of the International Union of Mine, Mill and Smelter Workers, District No. Five, an Affiliate of The Bessemer Smelters Council.

Whereas, there now exists a controversy between this Local and the Tenn. Coal, Iron & Railroad Company, at its mines near Bessemer, Alabama, and this controversy is of long standing and deals with the travel pay of our members employed by the above mentioned Company at its iron ore mines in its production and maintenance departments; and these employees are required to report at the mouth or collar of the mines at 6 o'clock, A. M. in the morning for the purpose of being loaded into man-trips and other methods of entering the mines, they being under-ground workers; and at the mouth or collar of the mines are checked in at six o'clock and immediately given supplies, tools, equipment and instructions, and then they proceed to their working places, which is approximately 2 miles from the mouth or collar of the mines and down under the ground, which requires and consumes approximately one hour's time before they then arrive at their usual working places; all of this time being spent on the premises of the Company, and after the men are checked in and given supplies, equipment and instructions then they proceed to their working places to perform their usual tasks, after which they return to the mouth or collar of the mines arriving there about four o'clock in the afternoon, and are checked out, thus requiring the employees to be on the premises on duty and in the performance of their work for the Company ten (10) hours per day in the mines, totaling fifty hours per work week, and

Whereas, immediately after our Union was set up, and ever since that time, we have been protesting the travel pay of our members in this mine, and this controversy is based upon the time spent by our members on the premises of the Company each work week and being in excess of the hours required to work under the law, and as we understand it, in violation of the rules and law, and which time amounts to approximately 10 hours per work day, and employees affected by this condition numbering approximately 1015. And we further believe that in view of the fact that the Fair Labor Standards Act was passed primarily for the purpose of reducing excessive required hours on the premises of the employer during any given work week, and

Whereas, the Fair Labor Standards Act is recognized and being compiled with in many instances without any controversy on the part of the employers, but notwithstanding that fact and in the face of many rulings by the Wage and Hour Board supporting our position and conditions of work, we are still required by the said Company to be on the premises of the Company many hours in excess of the work week, and for which we receive no pay.

Therefore, be it resolved by this Local in regular meeting assembled that we authorize and request our Local and National officers to immediately bring about a correction of these conditions and require the Company to immediately comply with the Fair Labor Standards Act from now on, and also require the Company to pay all back time since the effective date of this law.

And we further authorize our officers to bring this Resolution to the attention of the Hon. Robert P. Amis, Regional Director of the Wage & Hour Division of the

Department of Labor in Birmingham, Alabama, and also with Col. Philip B. Fleming, Administrator of the Wage & Hour Division of the Department of Labor, Washington, D. C. And our officers both local and National are further authorized to take such steps as may be necessary and expedient, by negotiations or suit, in order to bring about a speedy conclusion of this controversy.

Be it further resolved that copies of this Resolution be immediately forwarded to all interested parties.

This is to certify that the above is a true and exact copy of a Resolution unanimously adopted by Local No. 123, in its regular meeting of October 12, 1940.

(Signed) W. C. GUNNIN,
As President of Local #123
of I. U. M. M. & S. W.

Attested by:
(Signed) ROBERT H. MARTIN,
As Recording Secretary.

.....,
Seal of Muscoda,
Local No. 123.

Copy

*A similar resolution mutatis mutandis was presented by Ishkooda Local No. 153 and Wenonah Local No. 157.

82 EXHIBIT "C".

Agreement.

This Agreement, dated October 6, 1938, is between Tennessee Coal, Iron and Railroad Company (hereinafter re-

ferred to as the "Company") and the International Union of Mine, Mill & Smelter Workers (hereinafter referred to as the "Union") on behalf of its members employed by the Company in its ore and limestone mines located at Muscoda, Wenonah, and Ishkooda, Jefferson County, Alabama.

Section 1. It is the intent and purpose of the parties hereto that this Agreement will promote and improve industrial and economic relationships between those employees who are members of the Union and the Company, and to set forth herein the basic Agreement covering rates of pay, hours of work and conditions of employment to be observed between the parties hereto.

It is understood and agreed that this Agreement pertains only to the members of the Union employed in the ore and limestone mines of the Company located at Muscoda, Wenonah, and Ishkooda, Jefferson County, Alabama.

The term "employee", as used in this Agreement, shall not include Foremen, Assistant Foremen or Supervisors in charge of any classes of labor who do not perform any regular work, or Watchmen or Patrolmen.

Section 2—Recognition. The Company recognizes the Union as the collective bargaining agency for those employees of the Company who are members of the Union. The Company recognizes and will not interfere with the right of its employees to become members of the Union. There shall be no discrimination, interference, restraint or coercion by the Company or any of its agents against any member because of membership in the Union.

The Union agrees not to intimidate or coerce employees into membership and also not to solicit membership on Company time or plant property.

The obligation on the part of both such parties not to exercise any intimidation or coercion shall be deemed to prevent any application to another of such force, either physical, moral or mental, as to induce or constrain him to do against his will something he would not have otherwise done, and not to commit any act of making any person timid or fearful or of deterring such person from some act by threats.

Section 3—Wages: It is agreed that the rates of pay now in effect shall remain in effect unless changed in accordance with the procedure set forth under Section 15.

Section 4—Hours of Work. Eight (8) hours shall constitute a day's work and forty (40) hours shall constitute a week's work. Time and one-half shall be paid for all overtime in excess of eight (8) hours in any one day or for all overtime in excess of forty (40) hours in any one week.

The eight (8) hour day means eight hours of work in or about the mines at the usual working places for all classes of labor, exclusive of the lunch period, whether they be paid by the day or be paid on the tonnage basis.

At the option of the Company (1) a day may be either a calendar day or any twenty-four (24) hour period, and (2) a week may be either a calendar week or any period of five (5) regular eight (8) hour turns on consecutive days, the last of said five (5) turns being followed by a forty-eight (48) hour rest period.

An employee who is a member of the Union shall not be paid both daily and weekly overtime for the same hours so worked.

Section 5—Irregular Work. When an employee absents himself from his work for a period of two days without the consent of the Company, other than because of proven sickness or a satisfactory explanation, he may be discharged. When any employees makes a habit of laying off for single days other than because of proven sickness and continues to do so after having been warned by the Company he shall be subject to discharge.

Section 6—Vacations. Each employee, who is a member of the Union, and who, prior to July 1, 1938, was continuously in the service of the Company five (5) years or more (continuity of service to be based on United States Steel and Carnegie Pension Fund Rules for Service Continuity) shall receive one week's vacation with pay, such vacation to be taken in a single period. Those who are granted vacations will be paid on their average rate of earnings per hour for the two day periods immediately preceding their vacation. The total hours of vacation pay will be the average hours they worked per week during that period, but not less than 40 hours nor more than 48 hours.

Vacations will, so far as possible, be granted at times most desired by employees, but the final right to allotment of vacation period is exclusively reserved to the Company in order to insure the orderly operation of the plants.

Section 7—Seniority. It is understood and agreed in all cases of promotion and increase or decrease of forces the following factors shall be considered, and where factors (b), (c), (d) and (e) are relatively equal, length of continuous service shall govern.

(a) Length of continuous service.

(b) Knowledge, training, ability, skill and efficiency.

(c) Physical fitness.

(d) Family status; number of dependents, etc.

(e) Place of employment.

Section 8—Adjustment of Grievances. Should differences arise between the Company and the Union or its members employed by the Company as to the meaning and application of the provisions of this Agreement, or should any local trouble of any kind arise in any mining division, there shall be no suspension of work on account of such differences but an earnest effort shall be made to settle such differences immediately in the following manner:

First, between the aggrieved employee, who is a member of the Union and the foreman involved;

Second, between a member or members of the Grievance Committee, designated by the Union, and the Foreman and Superintendent of the mining division.

Third, between a member or members of the Grievance Committee, designated by the Union, and the General Superintendent of the Mines;

Fourth, between the representatives of the Union and the representatives of the Executives of the Company; and

Fifth, by a board consisting of four members, two of whom shall be designated by the representatives signatory hereto, and two by the Company. Failing to agree,

the matter shall then be appealed to an impartial umpire to be appointed by mutual agreement of the parties hereto. The decision of the umpire shall be final. The expenses and salary incident to the services of the umpire shall be paid jointly by the Company and the Union.

Pending the hearing of disputes, the employees represented by the parties signatory hereto shall not cease work because of any dispute; and a decision reached at any stage of the proceedings shall be binding on both parties thereto; and shall not be subject to reopening by any other party except by mutual agreement.

Specified periods shall be agreed upon between the Grievance Committee and the Superintendent of each Mining Division for the presentation of grievances hereunder. Provided, however, that matters pertaining to discharges or other matters that cannot reasonably be delayed until the time of the next regular meeting may be presented at any time in accordance with the foregoing provisions.

The Grievance Committee for each Mining Division shall consist of not less than three employees of that Mining Division, and not more than six such employees, designated by the Union, who will be afforded such time off without pay, as may be required—

First, to attend regularly scheduled committee meetings,

Second, to attend meetings pertaining to discharges or other matters which cannot reasonably be delayed until the time of the next regular meeting, and

Third, any member of the Grievance Committee shall have the right to visit departments other than his own

at all reasonable times for the purpose of transacting the legitimate business of the Grievance Committee, after notice to and permission from his Foreman or his designated representative.

The actual number of members of the Grievance Committee at each Mining Division shall be mutually agreed upon between the Superintendent of the Mining Division and the Union.

It is specifically understood that the provisions of this Section respecting appeal to an umpire shall not apply to matters which may arise under Section 13 nor to matters which may arise under Section 15.

Section 9—Illegal Suspension of Work. A strike or stoppage of work on the part of the employees represented by the parties signatory hereto shall be a violation of this Agreement, and there shall be no strike or cessation of work until and unless the matter of complaint shall have been submitted and determined by all the methods providing for in this Agreement for the adjustment of disputes.

Section 10—Management. The management of the mines and the direction of the working forces, including the right to hire, suspend or discharge for proper cause, or transfer, and the right to relieve employees from duty because of lack of work, or for other legitimate reasons, is vested exclusively in the Company, provided that this will not be used for purposes of discrimination against any member of the Union.

Section 11—Discharge Cases. In the event a member of the Union shall be discharged from his employment from and after the date hereof, and he believes he has

been unjustly dealt with, such discharge shall constitute a case arising under the method of adjusting grievances herein provided. In the event it should be decided under the rules of this Agreement that an injustice has been dealt the employee with regard to the discharge, the Company shall reinstate such employee and pay full compensation at the employee's regular rate for the time lost. All such cases of discharge shall be taken up within five (5) days from the date of discharge and disposed of as promptly as possible.

Section 12—Safety and Health. The Company shall continue to make reasonable provisions for the safety and health of its employees at the mines during the hours of their employment. Protective devices, wearing apparel and other equipment necessary to properly protect employees from injury shall be provided by the Company in accordance with the practice now prevailing in each separate mine.

Section 13—Individual Wage Rates. Where alleged inequalities in wage rates prevail, the matter may be taken up for adjustment with Superintendent of Mining Division, and settlement made on a mutually satisfactory basis.

Section 14—Holidays: The following days shall be considered holidays, during which days there shall be no regular production work; however, it is understood that regular maintenance work will be carried on:

July 4th, Labor Day and Christmas.

If for any reason work other than regular maintenance work is performed on these days, it shall be paid for at the rate of time and one-half.

Section 15—Change or Termination. This Agreement shall continue until changed or terminated as follows:

(a) Either party may at any time and from time to time give ten (10) days written notice to the other party of the time for the commencement of a conference of the parties for the purpose of negotiating the terms and conditions of a change in this Agreement, which conference shall be at the office of the Company in Birmingham, Alabama, unless otherwise mutually agreed, and

(b) If, because of a failure to agree, this Agreement is not changed by written agreement entered into by the Company and the Union with twenty (20) days from the giving of said notice, then this Agreement and all of the provisions thereof shall terminate upon the expiration of twenty (20) days from the giving of said notice.

Both parties shall be obligated to attend the conference and negotiate in good faith and the neglect or refusal of the party to whom notice is given to so attend and to participate in the negotiations shall be the equivalent of a failure to agree and the refusal of either party to change any position which it may take as to changes proposed in the negotiations shall not be considered as a lack of good faith in the negotiations.

Section 16. Notice hereunder shall be given by registered mail to be completed by and at the time of mailing, and if by the Company be addressed to International Union of Mine, Mill and Smelter Workers, Van D. Jones, 233 Fairfax Avenue, Bessemer, Alabama, and if by the Union be addressed to the Company at Brown-Marx Building, Birmingham, Alabama. Either party may by like

written notice change the address to which registered mail notice to it shall be given.

INTERNATIONAL UNION OF MINE, MILL and SMELTER WORKERS,
By REID ROBINSON,
By VAN D. JONES,
By C. J. McDANIEL,
By E. T. PATTERSON,
By J. M. LEMLEY,
By FRANK ALLEN.
TENNESSEE COAL, IRON and RAILROAD COMPANY,
By E. M. BALL,
General Superintent, Ore Mines.
By J. F. VANCE,
Manager Industrial Relations.

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## MOTION OF PETITIONER-PLAINTIFF TENNESSEE COAL, IRON AND RAILROAD COMPANY FOR TEMPORARY RESTRAINING ORDER OR PRELIMINARY INJUNCTION.

90 (Civil Action No. 5232.)

Comes the plaintiff in the above entitled cause, and adopting the allegations of its bill of complaint as a part of this motion, moves the Court to issue herein a temporary restraining order or preliminary injunction restraining and enjoining said defendants and their agents, representatives, and all other underground employees of the plaintiff made parties defendant hereto as a class from prosecuting any suit or claim of any nature whatsoever against plaintiff for any additional wages or compensation

claimed to be due them under the terms and provisions of the said Act for any portion of their time, including the lunch period, spent in being transported or going to and from their actual places of work, and that the terms of said injunction be as set forth in prayer of said bill of complaint.

BORDEN BURR and
BENNERS, BURR, McKAMY & FORMAN,
Attorneys for Plaintiff.

Filed April 4, 1941.

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ORDER SETTING MOTION OF PETITIONER-PLAINTIFF TENNESSEE COAL, IRON & RAILROAD COMPANY FOR TEMPORARY RESTRAINING ORDER OR PRELIMINARY INJUNCTION FOR HEARING.

91 (Civil Action No. 5232.)

This matter coming on to be heard on the motion and prayer of the plaintiff for the issuance of a temporary restraining order or preliminary injunction, it is ordered by the Court that said motion be, and the same hereby is, set for hearing in open Court on the 17th day of April, 1941, at 10 o'clock A. M.

It is further ordered that service of a copy of the bill of complaint herein, of said motion and of this order be made upon the defendants in accordance with Rule 5 (b) of the Rules of Civil Procedure, and that such service be made not less than five (5) days before the time set for hearing.

This 4th day of April, 1941.

T. A. MURPHREE,
Judge.

Filed April 4, 1941.

Return of Service of Process on Petition of Tennessee Coal, Iron & Railroad Company, omitted from the printed record, pursuant to Rule 23 of this Court.

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## PETITION OF SLOSS-SHEFFIELD STEEL & IRON COMPANY.

(Civil Action No. 5233.)

94

### I.

### Allegations of Jurisdiction.

(a) Petitioner and Plaintiff (hereinafter referred to as "plaintiff") is a corporation organized under the laws of the State of New Jersey, and having its principal place of business and its mining and manufacturing operations in Jefferson County, Alabama.

(b) All of the defendants are citizens and residents of Jefferson County, Alabama.

(c) The matters in controversy, exclusive of interest and costs, exceed the sum of $3,000.

(d) Jurisdiction is also founded on the existence of a federal question in that it is a suit arising under a law regulating commerce.

(e) Jurisdiction is also founded in that this action arises under the Constitution of the United States and the Fifth Amendment to the Constitution of the United States.

(f) Jurisdiction is also founded in that this action arises under the Constitution of the United States and under that provision of Section 8 thereof reading as follows: "To regulate commerce with foreign nations, and among the several states, and with the Indian tribes"; the Act hereinafter referred to commonly called "Fair Labor Standards Act of 1938" relates to and is constitutionally based upon said clause.

(g) Jurisdiction is also founded on the existence of a question arising on a particular statute in that the action arises under the Act of June 25, 1938, Public Act No. 718 of the 75th Congress, Chapter 676, Sections 1 to 19, 52 Stat. 1060, Title 29 U. S. C. Sections 201 to 219, as amended by the Act of August 9, 1939, Public Act No. 344 of the 7th Congress, commonly called the "Fair Labor Standards Act of 1938", as hereafter more fully appears.

(h) This action is to secure a declaratory judgment and such incidental injunctive relief as may be proper under the provisions of the Federal Declaratory Judgment Act, Title 28, U. S. C. A. 400, the Judicial Code, Section 274(d); the Act of March 3, 1911, Chapter 231, Paragraph 274(d), as amended June 14, 1934, Chapter 512, 48 Stat. 955; as amended by the Act of August 30, 1935; Chapter 829, Sec. 405, 49 Stat. 1027.

(i) This action is also to secure such other, different and more general relief as may be proper under the allegations herein contained.

II.

The Plaintiff and its Operations.

The plaintiff owns and operates in Jefferson County, Alabama, two underground iron ore mines, one known as

the Sloss Red Ore Mine and the other known as the Ruffner Mine. A total of approximately 480 workers are employed at the said mines in duties which require them to work underground (these underground employees are the employees of the plaintiff with whom the controversy, as hereinafter alleged, exists and who are hereinafter made parties defendant thereto), said underground workers constitute approximately 85% of the total number of employees at said mines.

Access to the mine workings is by inclined slopes. The workable seam of ore in the Sloss Red Ore Mine averages approximately 8 feet, and in the Ruffner Ore Mine approximately four feet. The method of mining is the stope and pillar plan, and a complete cycle of operations averages two to four months. In this cycle there are varying amounts of production due to changing conditions. Normal operating requirements for a year call for 588,000 gross tons of ore from the Sloss Red Ore Mine and 158,000 from the Ruffner Mine. At the Sloss Red Ore Mine the men engaged in production work are paid upon the basis of a guaranteed base pay for a two-weeks period and receive additional compensation if they produce more than their quota in such period. At the Ruffner Mine the production men are paid on the basis of a flat day rate and receive additional compensation if they produce tonnage in excess of the fixed quota. These rates have been established systematically through collective bargaining with the defendants, taking into consideration the factors which make up a proper occupational rate.

The iron ore extracted from said mines is shipped to the company's blast furnaces several miles distant from the mine and all goes into the manufacture of pig iron. The company does not manufacture pig iron into steel and sells its pig iron in the open market in competition with other manufacturers of pig iron.

The plaintiff obtains a portion of its supplies and equipment from outside the State of Alabama and a large proportion of its manufactured pig iron is shipped by common carrier to points outside the State of Alabama.

In addition to its ore mines, the company operates two underground coal mines and uses a part of the coal and by-products thereof in the manufacture of its products. The operations in its coal mines, insofar as the questions involved here here are concerned and related, is in substance the same as its operations in its ore mines.

The general custom of procedure in the ore mines of the plaintiff, insofar as the underground employees are concerned, is substantially as follows: The use of the change or bath house provided by the plaintiff is entirely optional with the employees and they are not required to be at the bath house or change house at any particular time or in any particular groups. There is no check-in or check-out at the bath house. A substantial majority of the employees use the bath house or change house. The employee, after changing from his street clothes to work clothes at the change house, walks to the portal of the mine. The distance from the bath house to the portal at the Sloss Mine is approximately one-half mile, and the distance from the bath house to the portal at the Ruffner Mine is approximately 600 feet.

The Sloss Red Ore Mine employee provides his own lamp for use in the mine. Carbide lamps are used at that time and electric lamps are used at the Ruffner Mine. Where the carbide lamp is used, the company, for the convenience of the employees, sells the carbide to the miners at cost. It is not obligatory upon the employees to buy the carbide from the plaintiff, but practically all of the employees do so. It is necessary to secure carbide for the lamps two or three times each week. Where the

electric lamp is used, the company furnishes the lamp and services the same for a small daily charge which is at cost to the company.

All men working underground are ordinarily lowered into the slopes in man skips to a landing place down in the mine. From this point they usually proceed on foot to their respective working places. At the Sloss Red Ore Mine there is a second slope down which mantrips are also operated and the men usually ride the mantrip on this second slope in going to and from their work; they have the choice as to whether they will ride or walk on the second slope. Employees are not required to ride on any particular mantrip either in going in or coming out of the mine, but can follow their own wishes in determining which trip they ride. The first mantrip leaves the portal at approximately 6:20 A. M. and the last at 6:50 A. M. at the Sloss Red Ore Mine and four trips are operated from the surface. The day shift begins at 7 o'clock, A. M. and the men are expected to be at their regular working places at the beginning of the shift. The day shift operations cease at 3:15 with a 15-minute lunch period taken at 11 o'clock, A. M. The night shift begins at 6 o'clock, P. M. and ends at 2:15 o'clock, A. M. with a 15-minute lunch period taken at 10 o'clock, P. M.

The practices on the day and night shifts are substantially the same.

At the Ruffner Mine the shift begins at 7 o'clock, A. M. and ends at 3:30 o'clock, P. M. with a 30-minute lunch period. At that mine the first mantrip leaves the surface at 6:30 o'clock A. M. and the second one at 6:45 o'clock, A. M. The men go to an unloading station down in the mine and then to their places of work by foot.

At the Sloss Red Ore Mine at the end of the day shift blasting begins at approximately 3:10 and the men begin leaving the mine. The first mantrip arrives at the surface at approximately 3:30 o'clock P. M. The last mantrip reaches the surface about 4:10 P. M.

At the end of the day shift at the Ruffner Mine work ends at 3:30 and the first mantrip leaves the bottom at 3:35 P. M. and the second at 3:50 P. M. The last man reaches the surface at approximately 3:55 P. M.

The men's time is computed and they are paid on the basis of eight hours work at the working place.

The time consumed by the men in getting from the portal to the working place in the Sloss Red Ore Mine varies between approximately 25 minutes and approximately 40 minutes, the average being approximately 32 minutes. At the Ruffner Mine the time required is somewhat shorter, the average being approximately 25 minutes. Time consumed in coming out of the mine is approximately the same.

In 1933 the plaintiff established at the Sloss Red Ore Mine an eight-hour day and forty-hour week. In 1937 the payment of time and one-half for all time over eight hours in any one day and for all overtime in excess of forty hours in any one week was begun, the eight-hour day meaning eight hours of work in and about the mines at the usual working places for all classes of labor, exclusive of the lunch period, whether the men were paid by the day or paid on the tonnage basis.

The Ruffner Ore Mine, after having been closed for twelve years, resumed operations in July 1940, and the eight-hour day and forty-hour week with time and one-half overtime was established in said mine, the eight-

hour day meaning eight hours a day in and about the mine at the usual working place. All underground employees of the plaintiff have been paid and have accepted their wages on the basis of eight hours per day at the usual working place. The plaintiff has never compensated its underground employees for any portion of that time spent in going to or from or in being transported to and from their actual work place, and such employees have at all times understood and agreed that they should not receive any compensation therefor.

The allegations herein set forth as to operations at the present time are substantially true as to the operations since 1933.

III.

The Defendants.

(a) The defendants Sloss Red Ore Local No. 109 and Ruffner Miners Union No. 512, affiliated with the International Union of Mine, Mill & Smelter Workers, are unincorporated associations, commonly known as "labor unions", each of whom have been selected by a majority of plaintiff's employees as their representative for collective bargaining in all matters concerning wages, hours and conditions of employment, each of said unions representing a majority and probably all of the plaintiff's employees.

(b) The individual defendants, John Hill, Jesse Gaines and W. A. O'Neal, are employees of the plaintiff and are officers and members of said Sloss Red Ore Local No. 109, who have selected said organization as their representative for collective bargaining.

(c) The individual defendants, Frank Parker, Hosea Bickerstaff and George T. Drummon, are employees of the plaintiff and are officers and members of the said Ruffner Miners Union No. 512, who have selected said organization as their representative for collective bargaining.

(d) The individual defendants, Van D. Jones, C. L. Pegues and Frank Allen, are respectively the Executive Board Member District No. 5, Secretary-Treasurer, and Organizer, of the International Union of Mine, Mill & Smelter Workers, an unincorporated national association, none of whom are employees of this plaintiff.

(e) The defendants herein named are made parties defendant in their individual and representative capacities, as hereinabove set forth and described, under Rule 23 of the Federal Rules of Civil Procedure as representative of all of plaintiff's employees, as all of such employees represent a class that is so numerous as to make it impracticable to bring them all before the Court, and such individual defendants, representing as they do the employees and different groups thereof, so fairly represent all employees as to insure adequate representation of all, and are, therefore, sued because the right sought to be enforced by the plaintiff against all the employees are several and there is a common question of law and fact affecting the several rights and common relief is sought against all.

Plaintiff has elected, in keeping with the statutes and rules of Court in such cases made and provided and more especially Rule 23, Rules of Civil Procedure, to make and name as parties herein the above and described defendants as being typical of the several classes of plaintiff's said underground mine employees whose rights would be affected by the decision to be rendered herein, and plaintiff avers that said employees, selected and named as defend-

ants, properly and fairly represent all of said underground mine employees, and that said underground mine employees are all interested in and parties to the controversy hereinafter described.

The plaintiff invites the timely intervention in this action of any of its other employees who are not specifically or individually made defendants hereto to intervene or join herein as parties defendant, all to the end that the controversy herein set forth and shown may be fully and fairly determined by this Court in this proceeding.

The Administrator of the Wage and Hour Division of the United States Department of Labor, as such administrator, is interested in the construction of the Act commonly called the "Fair Labor Standards Act of 1938", hereinafter referred to, and the plaintiff invites the timely intervention in this action of such administrator.

IV.

Statement of Controversy.

Plaintiff alleges that there is an actual and bona fide controversy existing as to the date of filing of this petition between the plaintiff on the one hand and the defendants herein named on the other hand, said controversy growing out of the following facts and being as herein stated.

Said controversy relates to the judicial construction of Section 7 of the Act, said section reading as follows:

"Section 7(a) No employer shall, except as otherwise provided in this section, employ any of his employees who is engaged in commerce or in the production of goods for commerce—

(1) for a workweek longer than forty-four hours during the first year from the effective date of this section,

(2) for a workweek longer than forty-two hours during the second year from such date, or

(3) for a workweek longer than forty hours after the expiration of the second year from such date, unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed."

The plaintiff asserts:

(1) That in following the wage and work schedule and procedure, as hereinbefore in Section II hereof set out, it has fully complied with the provisions of said Section 7, and that in working its employees in and about their actual working places eight hours per day for five days per week it is not employing said employees for a workweek longer than forty hours.

(2) That no part of the time spent by its underground employees in the bath house or in going from and to the bath house to or from the portal, or to and from the underground manloading station from or to the portal, or to or from the actual working places of the employees from or to the underground manloading station constitutes a part of the "workweek".

Otherwise stated, the plaintiff asserts that the Congress intended the word "workweek" to be construed as meaning the time actually spent by plaintiff's underground miners in or about their actual working places and did not intend to include as a part of the workweek the time spent

by such underground employees in being transported or walking to and from the places where they actually work.

3. That if the Congress did intend that traveling time of plaintiff's underground employes to and from the places where they actually worked should be considered as a part of the workweek, such legislation is violative of the Fifth Amendment to the Constitution of the United States.

4. That the workday does not include the fixed lunch period taken underground on the underground employees' time.

The defendants (being member of the International Union of Mine, Mill & Smelter Workers, affiliated with C. I. O.) assert:

1. That the Congress intended to include within the meaning of the word "workweek" all the time from the moment the underground employees leave the bath house before the beginning of the day's work until the moment they enter the bath house at the end of the day's work.

Otherwise stated, that the entire time from the moment the underground employees leave the bath house before the beginning of the day's work until the moment they enter the bath house at the end of the day's work should be considered as a part of the "workweek", and that the underground employees should be paid for all such time and should be paid overtime for such portion of the "workweek", as thus defined, which exceeds forty hours since October 24, 1940, and forty-two hours from October 24, 1939, to October 24, 1940, and forty-four hours from October 24, 1938, to October 24, 1939.

The controversy involves a large sum of money because:

If the interpretation of the Fair Labor Standards Act for which plaintiff contends is the correct interpretation it has paid to its underground employees all compensation due them under the provisions of the Act. On the other hand, if the interpretation which defendants must rely upon to entitle them to compensation for travel time from portal to portal is the correct interpretation of said Act, and if the estimate of the underground employees as to the amount of time for which they are entitled to compensation is correct, the amount involved is thousands of dollars.

Without a determination of this controversy it is impossible for plaintiff to know and ascertain whether or not it is violating the Act.

V.

The Opinion of the Administrator.

On March 23, 1941, the Administrator of the Wage and Hour Division, United States Department of Labor, announced a "Modified Portal to Portal Wage-Hour Opinion and Report", a complete copy of said opinion and report is hereto attached, marked Exhibit A and made a part hereof. Plaintiff avers that said report was made on March 15, 1941, for release on Sunday, March 23, 1941, and said opinion was made on March 17, 1941, for release on Sunday, March 23, 1941; that promptly upon receiving information as to said opinion and report, plaintiff, with other concerns like situated, filed with the Administrator its application for a reconsideration of said opinion; that a hearing on such application for reconsideration was held on Friday, March 28, 1941, before such Administrator, and the petition for a reconsideration taken under advisement.

Plaintiffs avers that the Administrator on the 1st day of April, 1941, denied said petitions for reconsideration, but postponed the effective date of the opinion from April 1, 1941, to May 1, 1941. Plaintiff avers that the threats of suits as hereinafter set forth on the part of the defendants have continued and are based, so plaintiff is informed and believes and on such information and belief states, largely if not altogether upon the opinion and report of the Administrator.

In said opinion the Administrator, in effect, expresses the opinion, and advises the plaintiff and other employers like situated, that the enforcement policy of the Division effective May 1, 1941, will be that the workday in plaintiff's mines "starts when the miner reports for duty as required at or near the collar of the mine, and ends when he reaches the collar at the end of the shift."

Otherwise stated, it is the expressed opinion of the Administrator that the word "workweek' 'in said Act includes the entire portion of time spent by plaintiff's underground miners in going from the entrance or portal of the mine to the places where they actually work, and in returning from such places to said portal.

Plaintiff has been advised by counsel, and on such advice charges that the opinion expressed by the Administrator has no legal force; that the Administrator, under the provisions of the Act, has, and claims to have no authority to judicially determine the legal effect of said provision of the Act; and that the opinion as thus expressed by the Administrator is erroneous and wrong. Said opinion is by no means a determining factor in this proceeding, but illustrates and emphasizes the bona fides of the controversy as herein set forth and the necessity for having said controversy fully, fairly and promptly determined by this Court.

There appears in said report (Exhibit A) the following footnote:

"While the Wage and Hour Division Bulletins are not binding on the Courts, it may be anticipated that judges will accord them especial weight; see United States v. American Trucking Associations, Inc., 310 U. S. 534. The Administrator has also from time to time issued statements concerning enforcement policy under which he proposes to proceed for reasons of administrative convenience." (Report, page 1, footnote 3.)

The institution and continuance in effect of the enforcement or threatened enforcement of said illegal and erroneous opinion of the Administrator subjects the plaintiff to the peril of the heavy penalties of the Act.

Plaintiff has been informed and believes and on such information and belief states:

(a) That on or about July 27, 1940, the Administrator made the following announcement:

"That on the basis of an inquiry submitted by the bituminous coal mining industry, the Wage and Hour Division in carrying out its enforcement duties in that industry will accord great weight to any reasonable standards for determining working time which represent the prevailing customs and practices in the particular industry and are supported by a long history of *bona fide* collective bargaining agreements. In view of the circumstances described by the industry in submitting its inquiry, Colonel Fleming announced that practice of computing working time on a 'face to face' basis in the bituminous coal mining industry would not be unreasonable. Colonel Fleming explained the term 'face to face' to mean the productive work performed after the miner arrives at his usual working place,

excluding the time spent in traveling from the portal or entrance of the mine to the place of work and the time spent in returning from the working place to the portal in the evening. The administrator added that the determination in the bituminous coal mining industry should not be considered to apply to any mining operations where the traditional practice of computing hours worked differs from the custom in the bituminous coal mining industry."

(b) That on or about September 18, 1940, the Administrator made the following announcement:

"The portal-to-portal matter also has been presented to us by the bituminous coal mining industry. In response to inquiry I said that the Wage and Hour Division, in carrying out its enforcement duties in that industry, will accord great weight to any reasonable standards for determining working time which represent the prevailing customs and practices in the industry and are supported by a long history of *bona fide* collective bargaining agreements. In view of the circumstances described by the industry in submitting its inquiry, I announced that the practice of computing working time on a 'face-to-face' basis in bituminous coal mining would not be unreasonable. The term 'face-to-fact' was explained to mean the productive work performed after the mine arrives at his usual working place, excluding the time spent in traveling from the portal or entrance of the mine to the place of work, and the time spent in returning from the working place to the portal at the end of the shift. This determination in the bituminous coal mining industry should not be considered to apply to any mining operations where the traditional practice of computing hours worked differs from the custom in bituminous coal mining. In the Cornucopia case, for example, custom and tradition had long recognized the portal-to-portal basis of reckoning time worked.

"We are not yet disposed to take any particular position as to whether the half hour spent eating lunch underground may be deducted from hours worked. The problem is a very difficult one because the employee is required to eat under very unfavorable conditions and is subject to many of the hazards of his job while eating. On the other hand, we recognize that the employee does have time off in order to have lunch and an argument can be made that such time need not be considered as hours worked. But as I say, the Division is not prepared at the present time to make any definitive determination on this question."

(c) That previous to the announcements stated above, the Administrator had issued the following statement:

"The Cornucopia Gold Mines, a corporation, with principal offices in Seattle, Washington, has been restrained from violations of the Fair Labor Standards Act, according to an announcement of the Wage and Hour Division, U. S. Department of Labor. This is the first Wage and Hour case in which judgment has been entered against a mining company. The corporation, operating a mine and mill near Cornucopia, Oregon, is engaged in the mining and concentrating of ore containing gold and silver.

"A judgment entered in the United States District Court for the Western District of Washington, Northern Division, on May 3, provides for the payment of restitution. Approximately $18,000 in back wages for overtime worked is due some 283 employees.

"An important stipulation contained in the judgment is that time spent by employees in traveling from the 'portal', or entrance, of the mine to the 'face', or place where they work, and from the 'face' back to the 'portal' is to be deemed time worked. This means that hereafter the

miners are assured of wages from the time they enter the mine until they leave it. Heretofore the miners were required to show only six hours of work on their time cards although they were actually in the mine for eight hours. The mining company previously had not paid for the two hours consumed by the men riding into the tunnel in the mine property and going up or down the shafts to their place of work for the day.

"Another important stipulation contained in the judgment is that lessees and employees of lessees are all deemed to be employees of the Cornucopia Gold Mines. The company, entering into leasing agreements with individuals to mine a portion of the property owned by the company, furnishes all material and supplies, including air, tools, machinery and equipment. All mining ore is brought to the company's mill which is also a part of the mining property. The lessees each employ one or more persons to assist them in regular mining activities. In other words, the lessees themselves are actually engaged in mining. The lessees receive a share in the net profits resulting from the sale of the ore mined by them and pay their own employees directly."

That the true facts in reference to the *Cornucopia* case referred to in such release were that the employer previous to the enactment of the Act had computed and paid wages on the "portal to portal" plan, and that following the enactment of the Act, for the purpose of attempting either to avoid its terms or to come within its terms, began to operate its mines and compensate its employees on the so-called "face to face" plan, and arbitrarily charged as transportation time a set time for traveling against all the employees without reference to the time actually spent by such employees in being transported to and from their working places, and that under these circumstances the decree referred to in the above release was entered by

the consent of the parties. Upon the publication in the various papers of the country of the release of the Administrator above referred to with reference to such decision, the claim of defendants that transportation time should be included in their compensation followed. Plaintiff avers that, as hereinbefore and hereinafter set out more in detail, the situation in its mines in reference to prior custom, prior contracts, and the computation and payment of compensation is exactly the reverse of the facts as existing in the Cornucopia Gold Mine.

(d) Plaintiff alleges on information and belief that hearings upon which the Administrator's opinion is based were held in Salt Lake City, Utah, conducted by Harold Stein as the representative of the Administrator, on December 11 and 12, 1940; that said hearings related substantially, if not altogether, to the non-ferrous mines of the West and had no proper relationship either to the iron ore mines of plaintiff and of other operators in the State of Alabama or to the iron ore mines as constituting a national industry; that hearings were held in the City of Birmingham, Alabama, conducted by the said Harold Stein, on January 14 and 15, 1941; that said hearings related solely to the limestone mine and iron ore mines of the plaintiff, Republic Steel Corporation, Tennessee Coal, Iron & Railroad Company and Woodward Iron Company as operated in Jefferson County, State of Alabama; that the evidence and information given at such hearing established without dispute the fact that since mining has been an industry in Alabama, down to and including the present time, it has been the universal and unvarying custom in all underground mines (coal, iron, limestone and all others) to compute and pay underground employees compensation on the basis of "working place to working place" and that there has never been computed or paid any compensation for the time spent in transportation or in going to and from the actual working places, and that all contracts, including

those now in existence with organizations representing the employees expressly provide for the computation and payment of underground employees on the basis of "working place to working place".

(e) Plaintiff alleges that neither in the hearings at Salt Lake City, Utah, or Birmingham, Alabama, so far as plaintiff has been able to acquire knowledge, was any evidence given or statements taken relating to any iron ore mines in any other portion of the United States other than the Birmingham District, although plaintiff, on information and belief, charges that the percentage of iron ore produced in the Birmingham District is less than ten (10) per cent of the total production in the United States of America, and of the total production there has never been, except in a few mines, in custom and practice the so-called "portal to portal" plan as sought to be instituted by the Administrator as representing his construction of Section 7 of the Act.

(f) That the opinion (Exhibit A) is based upon the report (Exhibit A) hereinbefore referred to; that said report contains the following factual averments:

"(1) *Face to Face.* The miners are paid only for working time at the face and excluding lunch. Except where the shift was measured by the work performed, this is probably the oldest method of computing the shift, but the record indicates that only a small percentags of underground metal miners are still paid on this basis. 12 The only important group of mines now operating on a face to face basis are those in Alabama.

"(2) *Collar to collar.* Far more common than face to face in modern practice, and universal in the states of Utah and Arizona, where it is required by law, is the collar to collar basis. On this basis, the miner is paid for

all time from the moment he descends from the surface to the moment he returns to the surface, except that in some mines the lunch period is not paid for. Characteristically, though not, invariably, the collar to collar shift is eight hours. Ordinarily lunch is eaten on the company's time, but a fixed lunch period is normal, nevertheless."

"The great majority of metal miners nowadays work in mines where they are paid for part or all of their underground travel time."

That the above statements are incorrect; that there is not in the Statement of Alabama any appreciable production of gold, silver, copper, lead and zinc which are the metals, for the most part, referred to and covered by said report; that the only ferrous metal mines in Alabama referred to and included in said report are the iron ore mines; that the method of mining and the production of iron ore has no real similarity to that of the metals above referred to, the mining of which is located principally in the Western states; that the ore mines in Alabama do not in any way come in competition with said metal mines, and that there is no practical or historical reason for considering the ore mines of Alabama in relation to or in connection with the metal mines above referred to; that the ore mining industry of the United States is one of tremendous size and importance; that in the year 1940 there was produced in the United States a total of approximately seventy-six million tons of iron ore, of which amount approximately sixty-three million tons or 84.2% were produced by the mines known as the "Lake Superior Ore Mining Territory," approximately seven million tons or 9.2% were produced by the ore mines in the State of Alabama, approximately three million tons or 4.7% of iron ore mines of New York, New Jersey and Pennsylvania, and one and one-half million tons or 1.6% by the

mines of Utah and Wyoming; that of the small amount produced in the Western states of Utah and Wyoming, approximately 90% thereof is produced in the State of Utah, which is controlled by a state statute requiring computation and payment of compensation on the co-called "portal to portal" basis; that instead of the greater majority of the metal miners now working in said mines being paid for part or all of their underground travel time, and the only important group of mines now operated on a "face to face" basis being those located in Alabama, as recited in said report, substantially all of the iron ore mines in the United States have been always and at the present time are operated upon and the compensation of their employees computed and paid on the "face to face" plan. Plaintiff avers that in approximately 100% of the mines of the United States producing iron ore, there is not now and there has never been in operation the so-called collar to collar plan.

Plaintiff avers that the basis for the opinion as given in the report and the reason therein assigned for applying the measuring rod of "face to face" to the bituminous coal mines of the United States and the measuring rod of "portal to portal" or "collar to collar" to the iron ore mines of the United States is not supported by the facts; that no real distinction can be made between the bituminous coal mining industry and the iron ore mining industry; and that the correct construction of Section 7 of the Act as applied not only to these industries, but to all other industries, is that the word "workweek" was used by the Congress as meaning actual work at the usual working places, and it was not the intention of the Congress to include in the word "workweek" time spent by an employee in going to and from his place of work, during which time he is not in any way engaged in the performance of any physical labor or of actual service for the employer.

## VI.

Necessity for the Relief of a Declaratory Judgment.

1. The Act contains, among others, the following provisions:

"Section 15:

"* * * it shall be unlawful for any person—

"(1) to transport, offer for transportation, ship, deliver, or sell in commerce, or to ship, deliver, or sell with knowledge that shipment or delivery or sale thereof in commerce is intended, any goods in the production of which any employee was employed in violation of section 6 (minimum wages) and section 7 (maximum hours), or in violation of any regulation or order of the Administrator issued under Section 14 relating to learners, apprentices, etc. * * *;

"(2) to violate any of the provisions of Section 6 (minimum wages) and section 7 (maximum hours), or any of the provisions of any regulation or order of the Administrator issued under Section 14 (relating to learners, apprentices, etc.);

"(3) to discharge or in any other manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this Act, or has testified or is about to testify in any such proceeding, or has served or is about to serve on any industry committee;

"(4) to violate any of the provisions of Section 12 prohibition against child labor);

"(5) to violate any of the provisions of Section 11 (c) (relating to reports, etc.), or to make any statement, report or record filed or kept pursuant to the provisions of such section or of any regulation or order thereunder, knowing such statement, report, or record to be false in a material respect.

"Section 16:

"(a) Any person who wilfully violates any of the provisions of Section 15 shall upon conviction thereof be subject to a fine of not more than $10,000, or to imprisonment for not more than six months, or both. No person shall be imprisoned under under this sub-section except for an offense committed after the conviction of such person for a prior offense under this subsection.

"(b) Any employer who violates the provisions of section 6 or section 7 of this Act shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. Action to recover such liability may be maintained in any Court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated, or such employee or employees may designate an agent or representative to maintain such action for and in behalf of all employees similarly situated. The Court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action."

As hereinbefore alleged, the plaintiff, under its assertion that "workweek" means time spent at the underground miners' usual working places has, since 1937, employed

its underground miners at their usual places of work forty hours per fiveday week. It therefore follows that if the assertions and contentions of either the Administrator or any class of plaintiff's underground mining employees are correct, that plaintiff will be subject, among other things, first, to the penalties as set forth in section 16(b), and, second, to the unpaid overtime compensation and to an additional equal amount as liquidated damages, and a reasonable fee to be paid to the attorneys of such underground employees who bring suits, together with the costs of the actions, and third, to the costs, expenses, and inconvenience of a multiplicity of actions, depending upon how many of said underground mining employees of the plaintiff institute such legal proceedings.

2. *Threatened litigation:*

Plaintiff is in immediate peril of threatened litigation because:

A. Defendants, Sloss Red Ore Local No. 109 and Ruffner Miners Union No. 512, affiliated with the International Union of Mine, Mill & Smelter Workers, by and through their duly constituted and authorized officers and through their legal counsel, asserted and contended in a conference held by the Wage and Hour Division of the Labor Department in Birmingham, Alabama, on January 14 and 15, 1941, that under the provisions and terms of the Act they were entitled to have counted as part of the "workweek" of their members approximately two hours claimed to have been spent each workday from the moment the men leave the bath house before the beginning of the day's work until the moment they enter the bath house at the end of the day's work, and including the lunch period.

B. That officers and members of said defendant Locals Number 109 and 512, have for several months past and

up to and including the time of the filing of this petition, made many and repeated statements and threats to institute and prosecute suits against the plaintiff under the provisions of the Act for the purpose of enforcing the payment by plaintiff of overtime (claimed as above set forth) at the rate of one and one-half times the regular rate at which plaintiff's underground miners were employed.

C. Plaintiff has been informed, believes such information, and on such information and belief charges that said defendants, Locals Number 109 and 512, affiliated with the International Union of Mine, Mill and Smelter Workers, have employed attorneys and authorized and directed them to proceed in the prompt bringing of such legal proceedings as may be necessary to enforce against the plaintiff their claims for such overtime payments.

D. Plaintiff has been informed and believes, and on such information and belief charges that on Sunday, March 23, 1941, defendant, Van D. Jones, Executive Board Member of District No. 5 of the International Union of Mine, Mill and Smelter Workers and the principal and head official of said union in the State of Alabama, publicly announced that the red ore miners of the Birmingham District, members of his union, would at once seek to recover a million dollars in back wages claimed to be due from plaintiff and other operators of iron ore mines in Jefferson County, Alabama, and that approximately six thousand Alabama red ore miners would bring litigation for the purpose of enforcing the collection of the claimed amounts.

Wherefore, plaintiff asserts that it is threatened with the immediate institution and prosecution of a multiplicity of suits involving large sums of money, and unless the declaration herein prayed for is granted, the plaintiff will be faced with great, if not irreparable, injury.

## VII.

### Probability of Great, if not Irreparable, Injury.

If the declaratory judgment herein prayed for is not granted, the plaintiff is in immediate peril of suffering great and irreparable injury because:

1. Of the vexation, cost and expense of a multiplicity of suits;

2. Of the delay in the settlement and determination of the controversy which will necessarily follow if the prompt remedy afforded by the Declaratory Judgment Act and Rule 57, Rules, District Courts of the United States, is not applied and the final determination of the legal question involved is left to the adjudication of such thereafter suits, the bringing of which is imminent;

3. Of the fact that, under the provisions of the Act, the threatened suits for overtime payments may be brought in different jurisdictions, in Federal Courts or in State Courts, and will be encumbered with the costs and expenses of such litigation and the delays incident to final determination and the chances of different adjudications by different jurisdictions.

4. The claims of the different individual employees and the different classes of employees are so different as to impose upon the plaintiff the perils and uncertainties incident to different contentions, and adjudications in reference to the legal issues herein sought to be declared.

5. Of the probability of cessation in work, and losses and damages and ill-feelings by reason of labor disburbances, which will almost inevitably follow if the plaintiff fails to comply with the present illegal and erroneous

opinion of the Administrator; or if in attempting to comply it is forced to insist on a reduction of the compensation now being paid its underground employees.

6. Of the necessity of reaching or attempting to reach new collective bargaining contracts with the labor organizations, the provisions of existing contracts being abrogated, if the illegal and erroneous opinion of the Administrator or the assertions of the defendants are adhered to.

7. Of the great expense that the plaintiff will be put to in changing its operations from the "working place to working place" plan to the "portal to portal" plan, in the event by reason of the Administrator's opinion and the perils of not complying therewith it feels compelled to endeavor to comply therewith.

## VIII.

### Perils of Decision.

Unless the plaintiff can obtain a prompt declaration on the issue of law here presented, it is confronted with unusual and immeasurable perils of making a decision because:

1. If it, under advice of counsel, decides to stand by its construction of the law, and the Court should ultimately decide that the assertions either of the Administrator or of individual employees or any of the classes of plaintiff's employees are correct, plaintiff would be subject:

A. To the costs, expenses and heavy penalties which would be imposed under Section 16(b) of the Act.

B. To the penalties of fine and imprisonment imposed by Section 16(a) of the Act.

C. To having the Administrator, under the warning given in his opinion of March 23, 1941 (Exhibit A hereto attached) proceed against it by injunction proceedings under Section 17 of the Act, and the prevention of the shipment in interstate commerce of its manufactured products.

2. If, on account of the perils incident to standing on its conviction under advice of counsel, it feels impelled on account of the uncertainties and delays of litigation to accept and comply with the opinion either of the Administrator, or with the demands and assertions of defendants, plaintiff will probably, and in many respects certainly, be subject to or have imposed upon it:

A. The payment of large sums of money to its employees for overtime as contended by them.

B. The planning and institution of new methods of operations which will result in great loss and damage to the plaintiff because —

(a) complainance will result in a large reduction in production if the "portal to portal" plan should be put in effect and the underground employees could not remain underground more than eight hours per working day, which would mean that the time spent in going to and from the working places or from the bath house would have to be subtracted from the time now spent in actual work at the actual working places, thereby reducing the actual day's work time from eight hours to six or six and one-half hours, depending upon the correctness of the contentions of the various classes of employees;

(b) the loss of working time would be much greater if the employees' contention that time spent in going to and from the bath house, the time spent in transportation

from portal to portal and the lunch period are included as a part of the workday for which they should be compensated;

(c) on the basis of loss of production as estimated by the plaintiff, the installation of the portal to portal system would mean a loss of approximately 19% of the production of the Sloss Red Ore Mine and of 12½% of production of the Ruffner Mine. Normal operations of the company call for 588,000 tons of ore to be produced at the Sloss Red Ore Mine and 158,000 tons at the Ruffner Mine per year, and the blast furnaces of the plaintiff require this tonnage of ore for the normal year's operations from the aforesaid mines;

(d) there would be a large loss in wages paid to the employees: if the "portal to portal" system were put into effect it would mean the revaluation of the company's present hourly rates. Its present wage rates are based on a systematic evaluation of the job, taking into consideration and skill, physical effort, mental effort, fatigue, etc., involved. These rates are based on eight hours of work in and about the usual places of work, and, therefore, if the traveling time is deducted from the productive labor time, and added to the nonproductive time, the earnings of the employees would be substantially reduced. The amount of time worked by the producing crews by reason of the installation of the so-called "portal to portal" system would necessarily so reduce the amount of production by such crews as to largely eliminate earnings of such crews in excess of the base rates of pay, and would necessarily result in a large loss to the individual miners;

(e) it would materially increase the cost of the company's manufactured products into which its entire iron ore production enters. Based on the normal year's operations, the reduction of approximately 19% of the ore pro-

duced at the Sloss Red Ore Mine, which would result if the "portal to portal" system is put into effect, amounts to approximately 111,720 tons of ore, and the reduction of ore produced at the Ruffner Mine by reason of the installation of said system would amount to 19,760 tons. The loss for a normal year would result as follows:

| | | |
|---|---|---|
| Total ore mined, Sloss Red Ore Mine .... | 588,000 | tons |
| Less 19% in production of iron ore (the loss that would result from including transportation time) ..... | 111,720 | tons |
| Total ore mined, Ruffner Mine ..... | 158,000 | tons |
| Less 12½% in production of iron ore (the loss that would result from including transportation time) ..... | 19,760 | tons |
| Total loss of production on "portal to portal" basis ..... | 131,400 | tons |
| Tons of iron ore required per ton of pig iron | 2.64 | tons |
| Tons of pig iron manufactured from 131,400 tons of iron ore (131,400 -:- 2.64) .... | 49,772 | |

(f) it would greatly increase plaintiff's cost per ton of ore produced;

(g) it would place the plaintiff at a serious disadvantage with its competitors and would deprive it of a substantial portion of its existing markets;

(h) it would void the existing written contracts between plaintiff and the Locals of the said labor organization, thereby rendering necessary negotiations for new contracts and disturbing the harmonious relations that exist between plaintiff and its employees under the operation of the existing contracts;

(i) the plaintiff has placed itself subject to the Nation's call for National Defense. Increased production called for by the requirements of National Defense cannot be achieved if the portal to portal plan, which, in effect, will reduce production working at Sloss Mine approximately 25%, is put into effect;

(j) the plaintiff's cycle of operations; computation of wages, payment of wages, methods and forms of bookkeeping, rules and regulations governing employees, method and time of transportation, assembly and delivery of tools, powder and equipment, and activities of service and surface crews have all been by long and unvaried custom and written contracts with the said labor organizations, related to and based upon the "face to face" basis and to change this method would be difficult if not impossible.

## IX.

## Great Weight Should be Accorded to any Reasonable Standards which Represent the Prevailing Custom and Practice in the Particular Industry, and which are Supported by a Long History of Bona Fide Collective Bargaining Agreements.

The reasonableness of plaintiff's contention is supported by the following, among other, facts:

1. It has been for more than fifty years the unvarying and continuous custom in plaintiff's ore mines, as well as in all other ore mines in Alabama, for the wages of underground ore miners to be computed and paid on the "face to face" basis.

2. It has been for more than fifty years the unvarying and continuous custom in plaintiff's ore mines, as well

as in all other ore mines in Alabama, that underground ore miners would not have their wages computed or paid for the necessary time spent in going from and to the surface and to and from their underground working places.

3. The same unvarying and continuous custom, as set forth in 1 and 2 above, has for more than fifty years existed in all underground coal mining operations of the plaintiff and of all other coal operators in the State of Alabama.

Plaintiff alleges that there can be, under conditions existing in the State of Alabama, no logical or possible differentiation between underground ore mines and underground coal mines, so far as the question under consideration is concerned.

4. The plaintiff, both prior and subsequent to the passage of the Fair Labor Standards Act, has negotiated and executed with the defendant Local No. 109, and subsequent to the passage of said Act with Local No. 512, contracts govering wages, hours of service, and other conditions of employment, and that these contracts, signed by the duly authorized representatives of the respective Locals, who were duly authorized to act for and in behalf of all plaintiff's underground employees who were members of such Locals, contains the following provision:

"Eight hours work per day shall constitute a day's work, and forty hours shall constitute a week's work. The eight hours per day means eight hours of work at the usual working place, exclusive of the lunch period."

The provision above quoted is contained in the contract which the plaintiff has with each of the aforesaid Locals at this time.

5. The written contract containing the above quoted provision between the plaintiff and Local No. 109 has been in force and effect since September 11, 1940, and the written contract containing said provision between the plaintiff and the said Local No. 512 has been in force and effect since March 17, 1941.

6. The laws of the State of Alabama during all of the period of time herein referred to have recognized in garnishment proceedings, wage suits, and other related matters, that the payment and computation of wages in underground mines should be on the "face to face" basis.

## X.

### Contractural Obligations.

1. The contracts above referred to between the plaintiff and Local No. 109 and Local No. 512 were negotiated and executed in good faith between the parties thereto. Copies of the said contracts are attached hereto, marked Exhibits B and C, and made a part hereof.

2. In the negotiation and execution of said contracts, the "face to face" definition of the workday constituted a part of the consideration for the execution of said contracts on the part of the plaintiff. The members of the unions have, since the execution of the contracts, accepted and are continuing to accept the benefits accruing to them under said contracts, and have held and are continuing to hold the plaintiff obligated by their terms and provisions. Plaintiff asserts that during the term of said contracts the members of the labor organizations who executed them are bound by the terms thereof, including the agreement therein contained as to what constitutes the workday and "workweek".

## XI.

### Petition and Prayer.

Wherefore, plaintiff petitions and prays this Court to make and enter a decree and judgment declaring the rights of the respective parties hereto in the premises and more particularly plaintiff's right as asserted in the following specific propositions:

### A.

Has the plaintiff, in following the work schedule and procedure as hereinbefore in Section II hereof set out, fully complied with the provisions of Section 7 of the Act?

### B.

Did the Congress, in the enactment of Section 7 of the Act, intend that the workweek should consist of the time actually spent by the underground employees of the plaintiff working at and around their usual working places?

### C.

Did the Congress, in the enactment of Section 7 of the Act, intend that the workweek of plaintiff's underground employees should include any portion of their time spent in being transported or walking to and from their usual working places?

### D.

Did the Congress, by the language employed in the Act, and particularly Section 7 thereof, evidence an intention that the workday of plaintiff's underground employees should include any time other than the time agreed upon

between them and plaintiff, as shown by the long existing custom and usage and the history of the contracts between plaintiff and the Unions representing them in the negotiation and execution of contracts, including the present contract under which such employees are working?

E.

When does the workday of plaintiff's underground employees begin and end within the meaning of the Fair Labor Standards Act?

F.

Are the assertions of the plaintiff as herein set forth as to the intentions of the Congress in the use of the word "workweek" legal and correct?

Premises Considered, plaintiff petitions and prays that the Court adjudge and answer, separately and severally, each of the questions specifically set forth in the above paragraphs numbered A to F, both inclusive, and determine and declare:

(a) That the work time of plaintiff's underground employees should be computed and compensated for upon the basis of work done at their usual working places, excluding the travel time in going to and from such working places.

(b) That the work time of plaintiff's underground employees should be computed and compensated for upon the "face to face" basis.

(d) That the plaintiff is not indebted to its underground employees for time spent in traveling from the sur-

face to their regular working places and in returning from such working places to the surface.

And plaintiff further prays that said defendants and their agents, representatives, and all underground employees of the plaintiff made parties defendant hereto as a class, be restrained and enjoined from prosecuting any suit or claim of any nature whatsoever against plaintiff for any additional wages or compensation claimed to be due them under the terms and provisions of the said Act, and plaintiff prays for a general declaratory judgment with reference to the questions presented by this petition, and a judgment against the defendants for costs herein, and if the plaintiff be mistaken in the relief prayed for, plaintiff hereby prays for such other, further, more different or general relief as to the Court may seem meet, just and proper, the premises considered.

Plaintiff prays that in accordance with Rule 57, District Court of the United States, the Court ordered a speedy hearing of this action and advance it on the docket.

ERNEST L. ALL,
S. M. BRONAUGH,
Attorneys for Plaintiff.

2100 Comer Building,
Birmingham, Alabama.

BRADLEY, BALDWIN, ALL & WHITE,
Of Counsel.

State of Alabama,
Jefferson County.

Before me, Mable R. Watt, a Notary Public in and for said county in said state, personally appeared Ben Davis, who being by me first duly sworn, deposes and says that he is the Vice President of Sloss-Sheffield Steel & Iron

Company, the plaintiff in the foregoing bill of complaint, and is a resident of Jefferson County, Alabama; that he has read the foregoing complaint, and that the facts averred therein as of fact are true and correct, and that as to the matters therein stated to be alleged on information and belief, he verily believes to be true and correct.

BEN DAVIS.

Sworn to and subscribed before me on this 4th day of April, 1941.

MABLE R. WATT,
Notary Public.

(Seal)

Filed April 4, 1941.

132 EXHIBIT A.

Exhibit A to the petition of Sloss-Sheffield Steel & Iron Company is a copy of the Opinion and Report of the Administrator of the Wage and Hour Division of the United States Department of Labor, marked "For Release Sunday, March 23, 1941," and is in all respects identical with Exhibit A to the petition of the Tennessee Coal, Iron & Railroad Company, heretofore set out on page 76 of this transcript.

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133 EXHIBIT "B".

Agreement.

This Agreement dated Sept. 11, 1940, and entered into by and between the Sloss-Sheffield Steel & Iron Company (hereinafter referred to as the "Company") and Sloss Ore Local No. 109 of the International Union of Mine, Mill

and Smelter Workers, (hereinafter referred to as the "Union") on behalf of employees employed in the Production and Maintenance Departments of the Sloss Red Ore Mine, located at Bessemer, Alabama.

Section 1—Recognition.

(a) The Union shall be and is hereby recognized as the exclusive bargaining agency for the employees in the Production and Maintenance Departments for the purpose of collective bargaining with respect to rates of pay, wages, hours of employment and other conditions of employment.

(b) The term employee used in this Agreement does not include foremen, supervisors, technical and clerical employees.

(c) It is distinctly understood that the Management of the mine and the direction of the working force, and the right to hire and discharge are vested exclusively in the Company.

Section 2—Check Off.

The Company agrees upon individual written authorization by the employee to deduct Union dues in the amount not to exceed one dollar ($1.00) per month from such employee. Initiation and other fees (not to exceed two dollars ($2.00) for any one man, and in sums not to exceed one dollar ($1.00) per man in any one pay period), wherein individual written authorization has been made to the Company by the employee, shall be deducted by the Company. All such deductions shall be forwarded to the financial secretary of Local Union 109 on or before the tenth of the following month.

In case any employee shall enter suit or process against the Company for the amount deducted under this section pursuant to such check-off paid to its representatives, the Union will reimburse to the Company the amount of any loss sustained by the Company by reasons thereof, including costs and expense of the suit.

Section 3—Mine Committee.

The duties of the Mine Committee shall be confined to the adjustment of disputes arising from this Agreement with the employees represented by them that the mine management and employee, or employees, have failed to adjust. The Mine Committee shall have no other authority nor exercise any other control, nor in any way interfere with the operation of the mine. The Mine Committee has no authority to direct the working forces in or about the mine or any part thereof. For violation of these clauses or any of them the Committee or any member thereof shall be immediately removed from the Committee, and shall be ineligible to serve as a committeeman for six months thereafter.

Section 4—Hours of Work.

(a) Eight hours work per day shall constitute a day's work and forty hours shall constitute a week's work. The eight hours per day means eight hours of work at the usual working place, exclusive of the lunch period.

The Company shall have the right during the life of this Agreement to operate the mine one, two or three eight-hour shifts by different crews of men within each twenty-four hour period.

(b) The eight hours per shift will not apply in case of accidents or breakdowns which may temporarily neces-

sitate longer hours for those employees required on account thereof, and also excepting the number of men required to handle man trips, and those required to remain on duty while men are entering or leaving the mine.

(c) Time and one-half shall be paid for all work performed in excess of eight hours per day or forty hours per week excepting a few occupations where application of this rule is not practical.

Section 5—Holidays.

The following Holidays shall be observed by the Company—Independence Day, Labor Day, Thanksgiving Day and Christmas Day; except for necessary maintenance or repair work, and those employees whose occupations require continuous duty.

Section 6—Vacations.

(a) Each employee who, prior to June 1st, 1941, shall have been continuously in the service of the Company for a period of three (3) years shall receive a vacation with pay on the following basis:

Three (3) years and less than five (5) years—three (3) working days.

Five (5) years and less than ten (10) years—six (6) working days.

Ten (10) years and less than fifteen (15) years—eight (8) working days.

Fifteen (15) years and over—ten (10) working days.

(b) During the three-year period prior to June 1st, 1941, any employee who voluntarily left the service of the Company for one or more days will not be entitled to vacation pay.

(c) An employee must be in the active service of the Company at the time of allotment of vacation to be entitled to same and vacations will, so far as possible, be granted at times most desired by the employees, but the final right to allotment of vacation period is exclusively reserved to the Company in order to insure the orderly operation of the plant.

(d) Service will be considered continuous where employee has not been off payroll more than three months in the past year prior to June 1st, 1941, or a total of fifteen months in past five years prior to June 1st, 1941, through being laid off by the Company account of curtailed operations.

Section 7—Miscellaneous Provisions.

(a) It is agreed to observe during the life of this Contract the same practices and customs in regard to the promotion, or increases and decreases in the working forces, as have been practiced in the past.

(b) Any change in mining methods or installation of machinery that relieves or hinders the employee of any of the duties incidental to his regular work and/or increases or decreases his productive capacity shall be recognized and a new piecework rate shall be agreed to therefor, and same shall be properly related to the basic rates for such work.

(c) In the event of a shut-down and if the Company gives the employees credit to purchase provisions and

supplies at the Company Commissary, on resumption of operations the employees' wages shall be cut in accordance with his ability to pay.

Section 8—Wages and Rates of Pay.

(a) The wage rates attached hereto will be the prevailing rates of pay for the duration of this Agreement.

(b) Whenever an employee has been directed by the foreman to proceed to his usual working place in the mine and is then subsequently ordered by the foreman to return to the surface without having been permitted to perform any work, he shall be entitled to two hours' pay, providing the work is not interrupted by labor dispute.

(c) When an employee working on piecework is required by mine officials to leave his work at the face and perform other work he shall be paid at the rate for a miner on Company work.

(d) When an employee has no work at the face, and is given other work, he shall be paid at the scale for such labor.

(e) It is agreed that in event general wage advances are granted or decreases made to red ore miners by a majority of the red ore producing companies in this district during the life of this Agreeement, it is understood that the question of considering wage adjustments for Sloss employees will then become a subject for collective bargaining under terms of this Agreement.

Section 9—General Clauses.

(a) This Agreement may be amended or revised in any of its provisions during its existence, provided such amend-

ments or revisions are approved in writing, and subscribed to by the Union and the Company.

(b) This Contract shall not conflict with any present State or Federal Law, or laws that may be enacted during the life of said Agreement.

(c) It is understood and agreed that Section 11 (d) (Settlement of Grievances) shall not be effective in the arbitration of wage increases, wage reductions or wage adjustments.

Section 10—Discharge or Suspension.

If it shall be determined that an employee has been discharged or suspended without just cause, the Company shall immediately reinstate the employee and compensate him for time lost at his regular rate of pay.

Section 11—Settlement of Disputes.

If an employee, or employees, shall consider that he or they have any grievance against the Company, an earnest effort shall be made, subject to the terms and provisions of this Contract, to adjust same by the following successive steps:

(a) Between employee and his foreman.

(b) Between Mine Committee and Superintendent of the Mine.

(c) Between Mine Committee or Representatives of the Union and the General Superintendent of Ore Mines.

(d) If such grievance arising under the terms of this Contract is not adjusted and settled in the manner herein provided, then such grievance, that has not been settled by one of the modes aforesaid provided, shall be submitted to a Board of Arbitration, who shall be appointed to consider such unadjusted grievance, and shall be selected as follows: Two (2) to be chosen by the Company and two (2) to be chosen by the Union, and these four to choose a fifth member within ten (10) days. If these four fail to agree upon the fifth member, then within ten additional days he shall be chosen by the President of Sloss-Sheffield Steel & Iron Company and the Board Member of District 5 of the International Union of Mill, Mine and Smelter Workers. The decision of such Board of Arbitration shall be rendered without unreasonable delay, and the decision of a majority of said Board shall be final and binding on all parties involved in such grievance. Any expense incurred by the arbitrators shall be borne equally by the Company and the Union.

(e) There shall be no stoppage of work either by the Company or the Union, until full procedure of methods of settling grievances as outlined in this Agreement have been complied with.

Section 12—Effective Period and Termination.

This Agreement shall become effective on the 16th day of Sept., 1940, and shall be operative and remain in full force and effect for two (2) years from said date and from year to year thereafter, subject, however to the right of either party to terminate the agreement at the end of any yearly period after 16th day of Sept. 1942, by written notice given to the other party not more than thirty (30) days prior to nor less than fifteen (15) days prior to the end of any such year.

In Testimony Whereof, witness the signatures of the undersigned, this 11th day of Sept., 1940.

SLOSS RED ORE LOCAL #109,
I. U. of M. M. & S. W.,
(S.) By JOHN HILL,
President.
(S.) By JESSE GAINES,
Vice-President.
(S.) By W. A. O'NEAL,
Chairman Executive Board.
(S.) By VAN D. JONES,
Board Member District #5,
I. U. of M. M. & S. W.

SLOSS-SHEFFIELD STEEL & IRON COMPANY,
(S.) By ROY RATLIFF,
General Manager.

Outside Rates.

| Occupation | Hourly Rate | Amount Per Shift | Hours Per Shift |
|---|---|---|---|
| Truck Driver | $.540 | $4.32 | 8 |
| Teamster | .505 | 4.04 | 8 |
| Engineers—Main Hoist | .770 | 7.70 | 10 |
| Dumpers | .535 | 4.28 | 8 |
| Tipplemen | .535 | 4.28 | 8 |
| Conveyor Men | .535 | 4.28 | 8 |
| Weighmen | .675 | 6.08 | 9 |
| R. R. Car Loaders | .535 | 4.28 | 8 |
| Crusher Men | .635 | 5.08 | 8 |
| Machinist | .820 | 6.56 | 8 |
| Machinist Helper—1st Class | .570 | 4.56 | 8 |
| Machinist Helper—2nd Class | .540 | 4.32 | 8 |
| Blacksmith | .845 | 6.76 | 8 |
| Blacksmith Helper | .540 | 4.32 | 8 |
| Carpenter | .650 | 5.20 | 8 |

| Occupation | Hourly Rate | Amount Per Shift | Hours Per Shift |
|---|---|---|---|
| Carpenter Helpers | .505 | 4.04 | 8 |
| Car Repairmen | .635 | 5.08 | 8 |
| Car Repairmen Helpers | .580 | 4.64 | 8 |
| Drill Sharpener | .740 | 5.92 | 8 |
| Compressor Man | .695 | 6.26 | 9 |
| Watchman | .515 | 4.12 | 8 |
| Laborers | .450 | 3.60 | 8 |
| Slate Pickers | .450 | 3.60 | 8 |
| Ore Inspector | .580 | 4.64 | 8 |

Note: One and one-half times the above hourly rates will be paid for all time in excess of eight (8) hours per day or forty (40) hours per week, excepting supervisors, foremen and a few occupations where application of this rule is not practical.

Inside Rates.

| Occupation | Hourly Rate | Amount Per Shift | Hours Per Shift |
|---|---|---|---|
| Company drillers | $.755 | $6.04 | 8 |
| Driller helpers | .675 | 5.40 | 8 |
| Motormen | .685 | 5.48 | 8 |
| Coupler | .600 | 4.80 | 8 |
| Rockmen | .685 | 5.48 | 8 |
| Rockmen Helpers | .596 | 4.76 | 8 |
| Track Cleaners | .506 Ton | ... | ... |
| Timbermen | .685 | 5.48 | 8 |
| Timbermen helpers | .595 | 4.76 | 8 |
| Pipemen | .635 | 5.08 | 8 |
| Pipemen helpers | .595 | 4.76 | 8 |
| Chainers-Contract—.022 per ton or | .625 | 5.00 | 8 |
| Company chainers | .625 | 5.00 | 8 |
| Company chainer helpers | .600 | 4.80 | 8 |

| Occupation | Hourly Rate | Amount Per Shift | Hours Per Shift |
|---|---|---|---|
| Engineers—Main hoist | .755 | 6.42 | 8½ |
| Engineers—Auxiliary hoist | .685 | 5.48 | 8 |
| Stablemen | .635 | 5.08 | 8 |
| Rock, Timber and Track Foremen | .755 | 6.04 | 8 |
| Trackmen | .685 | 5.48 | 8 |
| Trackmen helpers | .595 | 4.76 | 8 |
| Roller Men | .605 | 4.84 | 8 |
| Pumpers | .605 | 4.84 | 8 |
| Electric Repairmen | .795 | 6.36 | 8 |
| Machinist | .795 | 6.36 | 8 |
| Miner on Company work* | .625 | 5.00 | 8 |

*See Section 8, (c) and (d) for application.

Note: One and one-half times the above hourly rates will be paid for all time in excess of eight (8) hours per day or forty (40) hours per week, excepting supervisors, foremen and a few occupations where application of this rule is not practical.

Hand Loaded Ore

Places 18 Feet or Less in Width

Basic Tonnage = 35 Tons Per Shift

5 Man Crew

| Occupation | No. Men | Rate Per Ton |
|---|---|---|
| Drill Man | 1 | $ .153 |
| Drill Man Helper | 1 | .138 |
| Muckers | 3 | .417 |
| Total | 5 | $ .708 |

Any additional tonnage produced will be paid for at the above rates.

When conditions develop beyond the control of a crew that prevents them from loading the basic tonnage and they are required to stay at the working place for the full 8-hour shift, wages equivalent to 90% of the basic tonnage earnings will be paid the crew on a pay period basis.

Hand Loaded Ore

Places Over 18 Feet in Width

Basic Tonnage = 43 Tons Per Shift

5 Man Crew

| Occupation | No. Men | Rate Per Ton |
|---|---|---|
| Drill Man | 1 | $ .129 |
| Drill Man* | .. | .112* |
| Drill Man Helper | 1 | .116 |
| Muckers | 3 | .351 |
| Total | 5 | $ .708 |

*To credit of Head Drill Man for Explosive and Supplies.

Any additional tonnage produced will be paid for at the above rates.

When conditions develop beyond the control of a crew that prevents them from loading the basic tonnage and they are required to stay at the working place for the full 8-hour shift, wages equivalent to 90% of the basic tonnage earnings will be paid the crew on a pay period basis.

## Drag Loaded Ore

### Basic Tonnage = 100 Tons Per Shift

### 15 Man Crew

### 8 Men One Shift: 7 Men Opposite Shift

| Occupation | No. Men | Rate Per Ton |
|---|---|---|
| Head Miner | 1 | $ .041 |
| Head Miner | .. | .110* |
| Drag Engineers | 2 | .062 |
| Drill Men | 4 | .121 |
| Drill Men Helpers | 2 | .053 |
| Muckers | 4 | .106 |
| Haulage Engineers | 2 | .046 |
| Total | 15 | $ .539 |

*To credit of Head Miner for Explosives and Supplies.

Any additional tonnage produced will be paid for at the above rates.

When conditions develop beyond the control of a crew that prevents them from loading the basic tonnage and they are required to stay at the working place for the full 8-hour shift, wages equivalent to 80% of the basic tonnage earnings will be paid the crew on a pay period basis.

Drag Loaded Ore

Headings Only

Basic Tonnage = 75 Tone Per Shift

8 Man Crew

| Occupation | No. Men | Rate Per Ton |
|---|---|---|
| Head Miner | 1 | $ .041 |
| Drag Engineer | 1 | .083 |
| Drill Men | 2 | .160 |
| Drill Men Helper | 1 | .070 |
| Muckers | 2 | .140 |
| Haulage Engineer | 1 | .060 |
| Total | 8 | $ .554 |

Any additional tonnage produced will be paid for at the above rates.

When conditions develop beyond the control of a crew that prevents them from loading the basic tonnage and they are required to stay at the working place for the full 8-hour shift, wages equivalent to 80% of the basic tonnage earnings will be paid the crew on a pay period basis.

Yardage Rates

| | |
|---|---|
| Slopes, 12′ wide or less | $17.80 per lin. yd. |
| Slopes, 18′ wide | 9.90 per lin. yd. |
| Headings, 18′ wide, or less | 9.90 per lin. yd. |
| Upsets | 7.85 per lin. yd. |
| Stope necks, 12′ wide or less | 17.80 per lin. yd. |
| Stope necks, 15′ wide or less | 13.90 per lin. yd. |
| Stope necks, 18′ wide or less | 9.90 per lin. yd. |
| Splitting a single stope into a double stope | 25.00 per lin. yd. |

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## EXHIBIT "C".

### Agreement.

This agreement dated March 17, 1941, and entered into by and between the Sloss-Sheffield Steel & Iron Company, (hereinafter referred to as the "Company") and Ruffner Iron Ore Miners Union No. 512 of the International Union of Mine, Mill and Smelter Workers, (hereinafter referred to as the "Union") on behalf of employees employed in the Production and Maintenance Departments of the Ruffner Red Ore Mine, located at Irondale, Alabama.

### Section 1—Recognition.

(a) The Union shall be and is hereby recognized as the exclusive bargaining agency for the employees in the Production and Maintenance Departments for the purpose of collective bargaining with respect to rates of pay, wages, hours of employment and other conditions of employment.

(b) The term employee used in this Agreement does not include foremen, supervisors, technical and clerical employees.

(c) It is distinctly understood that the Management of the mine and the direction of the working force, and the right to hire and discharge are vested exclusively in the Company.

### Section 2—Check-Off.

The Company agrees upon individual written authorization by the employee to deduct Union dues in the amount not to exceed one dollar ($1.00) per month from such employee. Initiation and other fees (not to exceed two dollars ($2.00) for any one man, and in sums not to exceed

one dollar ($1.00) per man in any one pay period), wherein individual written authorization has been made to the Company by the employee, shall be deducted by the Company. All such deductions shall be forwarded to the financial secretary of Union No. 512 on or before the tenth of the following month.

In case any employee shall enter suit or process against the Company for the amount deducted under this section pursuant to such check-off paid to its representatives, the Union will reimburse to the Company the amount of any loss sustained by the Company by reasons thereof, including costs and expense of the suit.

Section 3—Mine Committee.

The duties of the Mine Committee shall be confined to the adjustment of disputes arising from this Agreement with the employees represented by them that the mine management and employee, or employees, have failed to adjust. The Mine Committeee shall have no other authority nor exercise any other control, nor in any way interfere with the operation of the mine. The Mine Committee has no authority to direct the working forces in or about the mine or any part thereof. For violation of these clauses or any of them the Committee, or any member thereof, shall be immediately removed from the Committee, and shall be ineligible to serve as a committeeman for six months thereafter.

Section 4—Hours of Work.

(a) Eight hours work per day shall constitute a day's work and forty hours shall constitute a week's work. The eight hours per day means eight hours of work at the usual working place, exclusive of the lunch period.

The Company shall have the right during the life of this Agreement to operate the mine one, two or three eight-hour shifts by different crews of men within each twenty-four hour period.

(b) The eight hours per shift will not apply in case of accident or breakdowns which may temporarily necessitate longer hours for those employees required on account thereof, and also excepting the number of men required to handle man trips and those required to remain on duty while men are entering or leaving the mine.

(c) Time and one-half shall be paid for all work performed in excess of eight hours per day or forty hours per week.

Section 5—Holidays.

The following Holidays shall be observed by the Company—Independence Day, Labor Day, Thanksgiving Day and Christmas Day; except for necessary maintenance or repair work, and those employees whose occupations require continuous duty.

Section 6—Vacations.

(a) Each employee who, prior to June 1st, 1941, shall have been continuously in the service of the Company for a period of three (3) years shall receive a vacation with pay on the following basis:

Three (3) years and less than five (5) years—three (3) working days.

Five (5) years and less than ten (10) years—six (6) working days.

Ten (10) years and less than fifteen (15) years—eight (8) working days.

Fifteen (15) years and over—ten (10) working days.

(b) During the three-year period prior to June 1st, 1941, any employee who voluntarily left the service of the Company for one or more days will not be entitled to vacation pay.

(c) An employee must be in the active service of the Company at time of allotment of vacation to be entitled to same and vacations will, so far as possible, be granted at times most desired by the employees, but the final right to allotment of vacation period is exclusively reserved to the Company in order to insure the orderly operation of the plant.

(d) Service will be considered continuous where employee has not been off payroll more than three months in the past year prior to June 1st, 1941, or a total of fifteen months in past five years prior to June 1st, 1941, through being laid off by the Company account of curtailed operations.

Section 7—Miscellaneous Provisions.

It is agreed to observe during the life of this Contract the same practices and customs in regard to the promotion, or increases and decreases in the working forces, as have been practiced in the past.

Section 8—Wages and Rates of Pay.

(a) The wage rates attached hereto will be the prevailing rates of pay for the duration of this Agreement.

(b) It is agreed that in event general wage advances are granted or decreases made to red ore miners by a majority of the red ore producing companies in this district during the life of this Agreement, it is understood that the question of considering wage adjustments for Ruffner employees will then become a subject for collective bargaining under terms of this agreement.

Section 9—Settlement of Disputes.

If an employee, or employees, shall consider that he or they have any grievance against the Company, an earnest effort shall be made, subject to the terms and provisions of this contract, to adjust same by the following successive steps:

(a) Between employee and his foreman.

(b) Between Mine Committee and Superintendent of the Mine.

(c) Between Mine Committee or Representatives of the Union and the General Superintendent of Ore Mines.

(d) If such grievance arising under the terms of this Contract is not adjusted and settled in the manner herein provided; then such grievance, that has been settled by one of the modes aforesaid provided, shall be submitted to a Board of Arbitration, who shall be appointed to consider such unadjusted grievance, and shall be selected as follows:

Two (2) to be chosen by the Company and two (2) to be chosen by the Union, and these four to choose a fifth member within ten (10) days. If these four fail to agree upon the fifth member, then within ten additional days he shall be chosen by the President of Sloss-Sheffield Steel

& Iron Company and the Board Member of District 5 of the International Union of Mill, Mine and Smelter Workers. The decision of such Board of Arbitration shall be rendered without unreasonable delay, and the decision of a majority of said Board shall be final and binding on all parties involved in such grievance. Any expense incurred by the arbitrators shall be borne equally by the Company and the Union.

(e) There shall be no stoppage of work either by the Company or the Union, until full procedure of methods of settling grievances as outlined in this Agreement have been complied with.

(f) If it shall be determined that an employee has been discharged or suspended without just cause, the Company shall immediately reinstate the employee and compensate him for time lost at his regular rate of pay.

Section 10—General Clauses.

(a) This Agreement may be amended or revised in any of its provisions during its existence, provided such amendments or revisions are approved in writing, and subscribed to by the Union and the Company.

(b) It is understood and agreed that Section 9 (d) (Settlement of Grievances) shall not be effective in the arbitration of wage increases, wage reductions or wage adjustments.

(c) Each section of this Agreement has been arrived at through the process of collective bargaining between representatives of the employees and officials of the Sloss-Sheffield Steel & Iron Company.

Section 11—Effective Period and Termination.

This agreement shall become effective on the 17th day of March, 1941, and shall be operative and remain in full force and effect for two (2) years from said date and from year to year thereafter, subject, however, to the right of either party to terminate the agreement at the end of any yearly period after 17th day of March, 1943, by written notice given to the other party not more than thirty (30) days prior to nor less than fifteen (15) days prior to the end of any such year.

In Testimony Whereof, witness the signatures of the undersigned, this 17th day of March, 1941.

SLOSS-SHEFFIELD STEEL & IRON COMPANY,
By ROY RATLIFF,
General Manager.

RUFFNER MINERS UNION
#512, I. U. of M. M. & S. W.,
By FRANK PARKER,
President.
By HORSEA BICKERSTAFF,
Vice-President.
By GEO. F. DRUMMOND,
Chairman Executive Board.
By VAN D. JONES,
Board Member District #5,
I. U. of M. M. & S. W.

Outside Rates.

| Occupation | Hourly Rate | Amount Per Shift |
|---|---|---|
| Truck Driver | $ .540 | $4.32 |
| Engineer—Main Hoist | .770 | 6.16 |

| Occupation | Hourly Rate | Amount Per Shift |
|---|---|---|
| Tippleman | .535 | 4.28 |
| Weighman | .675 | 5.40 |
| Railroad Car Loader | .535 | 4.28 |
| Machinist | .795 | 6.36 |
| Machinist Helper—1st Class | .570 | 4.56 |
| Blacksmith | .795 | 6.36 |
| Carpenter | .650 | 5.20 |
| Carpenter Helper | .450 | 3.60 |
| Car Repairmen | .635 | 5.08 |
| Car Repairmen Helpers | .580 | 4.64 |
| Compressor Man | .650 | 5.20 |
| Watchman | .515 | 4.12 |
| Laborers | .450 | 3.60 |
| Slate Pickers | .450 | 3.60 |
| Lamp Man | .570 | 4.56 |

Note: One and one-half times the above hourly rates will be paid for all time in excess of eight (8) hours per day or forty (40) hours per week.

Inside Rates.

| Occupation | Hourly Rate | Amount Per Shift |
|---|---|---|
| Drillers* | $ .755 | $6.04 |
| Muckers* | .610 | 4.88 |
| Track Cleaners | .595 | 4.76 |
| Rockmen | .685 | 5.48 |
| Rockmen Helpers | .595 | 4.76 |
| Timbermen | .685 | 5.48 |
| Timbermen Helpers | .595 | 4.76 |
| Rock and Timber Foreman | .755 | 6.04 |
| Pipeman | .635 | 5.08 |
| Pipeman Helper | .595 | 4.76 |
| Chainers—Main Hoist | .625 | 5.00 |
| Chainers—Auxiliary Hoists | .600 | 4.80 |

| Occupation | Hourly Rate | Amount Per Shift |
|---|---|---|
| Engineers—Auxiliary Hoists .... | .685 | 5.48 |
| Trackman ..... | .685 | 5.48 |
| Trackman Helpers ..... | .595 | 4.76 |
| Roller Man ..... | .605 | 4.84 |
| Laborers ..... | .595 | 4.76 |
| Electrical Repairman ..... | .795 | 6.36 |
| Drag Operator* ..... | .755 | 6.04 |
| Face Man* ..... | .595 | 4.76 |
| Chute Man* ..... | .595 | 4.76 |
| Spotting Hoist Engineer* ..... | .595 | 4.76 |

*See pages 9, 10 and 11 for application for bonus in addition to above rates.

Note: One and one-half times the above hourly rates will be paid for all time in excess of eight (8) hours per day or forty (40) hours per week.

*Tonnage Bonuses

Drag Loading

Normal Crew of Six (6) Men—

Base 80 Tons Per Shift of Eight (8) Hours Worked

All excess tonnage above base of 80 tons per day, computed on a bimonthly basis, will be paid for at the rate of $0.30 per ton, divided between the crew as follows:

| | |
|---|---|
| Drag Operator ..... | $ .07 |
| Drillers (2) ..... | .14 |
| Face Man ..... | .03 |
| Chute Man ..... | .03 |
| Spotting Hoist Engineer ..... | .03 |

*Tonnage Bonuses

Hand Loaded Entries

Normal Crew of Three (3) Men—

Base 25 Tons Per Shift of Eight (8) Hours Worked

All excess tonnage above base of 25 tons per day, computed on a bimonthly basis, will be paid for at the rate of $0.48 per ton, divided between crew members as follows:

| | |
|---|---|
| Driller | $0.18 |
| Muckers (2) | .30 |

*Tonnage Bonuses

Hand Loaded Slopes

Normal Crew of Three (3) Men—

Base 18 Tons Per Shift of Eight (8) Hours Worked

All excess tonnage above base of 18 tons per day, computed on a bimonthly basis, will be paid for at the rate of $0.48 per ton, divided between crew members as follows:

| | |
|---|---|
| Driller | $0.18 |
| Muckers | .30 |

MOTION OF PETITIONER-PLAINTIFF SLOSS-SHEFFIELD STEEL AND IRON COMPANY FOR TEMPORARY RESTRAINING ORDER OR PRELIMINARY INJUNCTION.

157 (Civil Action No. 5233.)

Comes the plaintiff in the above entitled cause and adopting the allegation of its bill of complaint as a part of this motion, moves the Court to issue herein a temporary restraining order or preliminary injunction, restraining and enjoining said defendants and their agents, representatives, and all other underground employees of the plaintiff made parties defendant hereto as a class, from prosecuting any suit or claim of any nature whatsoever against plaintiff for any additional wages or compensation claimed to be due them under the terms and provisions of the said Act for any portion of their time, including the lunch period, spent in being transported or going to and from their actual places of work, and that the terms of said injunction be as set forth in the prayer of said bill of complaint.

S. M. BRONAUGH,
Attorney for Plaintiff.

Filed April 5, 1941.

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ORDER SETTING MOTION OF PETITIONER-PLAINTIFF SLOSS SHEFFIELD-STEEL AND IRON COMPANY FOR TEMPORARY RESTRAINING ORDER OR PRELIMINARY INJUNCTION FOR HEARING.

158 (Civil Action No. 5233.)

This matter coming on to be heard on the motion and prayer of the plaintiff for the issuance of a temporary

restraining order or preliminary injunction, it is Ordered by the Court that said motion be and the same hereby is set for hearing in open Court on the 17th day of April, 1941, at 10 o'clock, A. M.

It is further Ordered that service of a copy of the bill of complaint herein, of said motion, and of this order be made upon the defendants in accordance with Rule 5(b) of the Rules of Civil Procedure, and that such service be made not less than five (5) days before the time set for hearing.

This 5th day of April, 1941.

T. A. MURPHREE,
Judge.

Filed April 5, 1941.

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RETURN OF SERVICE OF PROCESS ON PETITION OF SLOSS-SHEFFIELD STEEL & IRON COMPANY, omitted from the printed record, pursuant to Rule 23 of this Court.

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PETITION OF REPUBLIC STEEL CORPORATION

160 (Civil Action No. 5234.)

I.

Allegations of Jurisdiction.

(a) That petitioner and plaintiff (hereinafter referred to as "plaintiff") is a corporation organized under the

laws of the State of New Jersey, and a resident of said State, authorized to transact business in the State of Alabama, and having one of its principal places of business, and mining and manufacturing operations, in Jefferson and Etowah Counties, State of Alabama;

(b) All of the defendants are citizens and residents of Jefferson County, State of Alabama;

(c) The matters in controversy, exclusive of interest and costs, exceed the sum of $3,000;

(d) That jurisdiction is also founded on the existence of a federal question in that it is a suit arising under a law regulating commerce;

(e) Jurisdiction is also founded in that this action arises under the Constitution of the United States and the Fifth Amendment to the Constitution of the United States;

(f) Jurisdiction is also founded on the existence of a question arising on a particular statute in that the action arises under the Act of June 25, 1938, Public Act No. 718 of the 75th Congress, Chapter 676, Sections 1 to 19, 52 Stat. 1060, Title 29, U. S. C., Sections 201 to 219, as amended by the Act of Congress of August 9, 1939, Public Act No. 344 of the 76th Congress, commonly called the "Fair Labor Standards Act of 1938", as hereinafter more fully appears.

(g) This action is to secure a declaratory judgment and such incidental injunctive relief as may be proper under the provisions of the Federal Declaratory Judgment Act, Title 28, U. S. C. A. 400, the Judicial Code, Section 274(d); the Act of March 3, 1911, Chapter 231,

Paragraph 274(d), as amended June 14, 1934, Chapter 512; 48 Stat. 955, as amended by the Act of August 30, 1935; C 829, Paragraph 405; 47 Stat. 1027.

(h) This action is also to secure such other different and more general relief as may be proper under the allegations herein contained.

## II.

### The Plaintiff and Its Operations.

Plaintiff owns and operates in Jefferson County, Alabama, two underground iron ore mines, one at Spalding (this mine is not involved in this proceeding) and the other at Raimund. The ore mine at Raimund has two openings. Access to the mine workings is by inclined slopes of approximately 45 degrees with vertical depth of cover of approximately 1,000 feet. The workable seam of ore averages about 6½ feet. The method of mining is a modified room and pillar plan, with open stopes. The operating requirements call for an average of approximately 82,000 gross tons of red ore per month (from Raimund and Shannon mines). The plaintiff extracts from said mine iron ore, and said ore is used by the Company in the manufacture of pig iron, some of which pig iron is sold in the open market but the larger portion of the pig iron thus manufactured is used in the manufacture at the Alabama plants of the plaintiff of structural steel, iron fencing, sheets, bars, and other products, such products being sold in various markets in competition with manufacturers of like products. The plaintiff obtains a portion of its supplies and equipment from outside the State of Alabama, and it ships the greater portion of its manufactured products by common carrier to points outside of the State of Alabama, and in some instances to foreign countries.

The plaintiff operates coal mines and uses the coal in the manufacture of its products. The operations in its coal mines, in so far as the questions involved here are related and concerned, are the same operations as the operations in its ore mines. The general custom and procedure in the ore mine is substantially as follows:

Plaintiff employs at its ore mine approximately 645 employees, and of this number 589 are underground employees (these underground employees are the employees of the plaintiff with whom the controversy as hereinafter alleged exists and who are hereinafter made parties defendant hereto). For the convenience of its underground employees the plaintiff provides bath house facilities, the bath house being located a short distance from the mine entrance hereinafter referred to as the "portal". The employees are not compelled to use the bath house facilities and the plaintiff does not require the presence of the underground employees at the bath house at any particular time or in any defined groups. No check-in or check-out is had at the bath house. While the use of the bath house is not obligatory, it is used by substantially all of the plaintiff's employees. The employee, after changing from street clothes to work clothes at the bath house, walks to the "portal".

All underground employees are lowered into the slopes in man skips to a central point called the underground manloading station. From this point the employees proceed on foot to their respective working places. For the purpose of transporting employees to the underground manloading station the plaintiff operates man skips. The employees are not required to ride on any particular man trip but can follow their own wishes in determining which trip they shall ride. Eight to ten man trips are required to lower all the underground employees in the

mine, the first trip leaving at approximately 5:15 A. M. and P. M. and the last trip leaving at approximately 6:30 A. M. and P. M. All men are expected to be at their regular places of work at the starting time, which is 7:00 A. M. day shift operations and 7:00 P. M. night shift operations. Day shift operations cease at 3:00 P. M. and night shift operations cease at 3:00 A. M.

No time is designated for lunch period, and no time is deducted from the eight-hour work period for lunch. After the day's work has been completed the employees walk from their working places and to the underground manloading station and are hoisted in the same manner as they are lowered into the mines.

The time taken in transportation from the portal to the underground manloading station and from the manloading station to the portal, and the time taken in walking from and to the man loading station to and from the usual working place varies, but may be conservatively estimated at not more than 2 hours and not less than 1 hour. The time taken by the employees from the moment they leave the bath house before the beginning of the day's work until the moment they enter the bathhouse at the end of the day's work varies, but may be conservatively estimated as averaging fifteen minutes. Several years prior to the enactment of the Act the plaintiff established in its ore mine an eight-hour day and forty-hour week, with payment of time and one-half for all the time over eight hours in any one day and for all overtime in excess of forty hours in any one week, the eight-hour day meaning eight hours' work in and about the mines at the usual working place, for all classes of labor. All underground mine employees have been paid and accepted their wages on the basis of eight hours per day from 7:00 A. M. or P. M. to 3:00 P. M. or A. M. The plaintiff

has never compensated its underground employees for any portion of their time spent in going to or from or in being transported to and from their actual workplace, and such employees at all times understood and agreed that they should not receive any compensation therefor; and such understanding and agreement has been specifically provided for by agreements, express or implied, between the Company and its underground employees.

The allegations herein set forth as to operations at the present time are substantially in all respects true as to operations for several years prior to the enactment of the Act.

## III.

## The Defendants.

(a) Defendant, Raimund Local 121, affiliated with the International Union of Mine, Mill & Smelter Workers, is an unincorporated association and has been selected by some of plaintiff's employees as their representative for collective bargaining in all matters concerning wages, hours, and conditions of employment, the exact number of the underground employees represented by said Local being unknown to plaintiff.

(b) The individual defendants, John Butler, Lewis Tarrant, and B. G. Stephens, are underground employees of the plaintiff and officers and members of said Raimund Local 121 who have selected said organization as their representative for collective bargaining.

(c) The defendant, Unit No. 8, Brotherhood of Miners of Captive Ore Mines of Alabama, is an unincorporated association not affiliated with any national organization

and has been selected by some of plaintiff's employees (underground) as their representative for collective bargaining in all matters concerning wages, hours, and conditions of employment, the exact number of plaintiff's underground employees who are represented by said Unit being unknown to plaintiff.

(d) Individual defendants, Melvin Lawrence, C. W. Eady, and J. E. Thornton, are underground employees of the plaintiff and members and officers of said Unit No. 8 who have selected said organization for their representative for collective bargaining.

(e) The defendants herein named are made parties defendant in their individual and representative capacities, as hereinabove set forth and described, under Rule 23 of Federal Rules of Civil Procedure, as representative of all of plaintiff's employees, as all of such employees represent a class that is so numerous as to make it impracticable to bring them all before the Court, and such individual defendants, representing as they do the employees and different groups thereof, so fairly represent all employees as to insure adequate representation of all, and are, therefore, sued because the right sought to be enforced by the plaintiff against all of the employees are several and there is a common question of law and fact affecting the several rights and common relief is sought against all.

Plaintiff has elected, in keeping with the statutes and rules of Court in such cases made and provided and more especially Rule 23, Rules of Civil Procedure, to make and name as parties herein the above named and described defendants as being typical of the several classes of plaintiff's said underground mine employees whose rights would be affected by the decision to be rendered herein, and plaintiff avers that said employees, selected

and named as defendants, properly and fairly represent all of said underground mine employees, and that said underground mine employees are all interested in and parties to the controversy hereinafterwards described.

The plaintiff invites the timely intervention in this action of any of its other employees who are not specifically or individually made defendants hereto to intervene or join herein as parties defendant, all to the end that the controversy herein set forth and shown may be fully and fairly determined by this Court in this proceeding.

The Administrator of the Wage & Hour Division, United States Department of Labor, as such Administrator, is interested in the construction (hereinafterwards prayed for) of Section 7 of the Act, commonly called the "Fair Labor Standards Act of 1938", and the plaintiff invites the timely intervention in this action of such Administrator.

## IV.

### Statement of Controversy.

Plaintiff alleges that there is an actual and bona fide controversy existing as of the date of filing this petition between the plaintiff on the one hand and the defendants herein named on the other hand, said controversy growing out of the following facts and being as herein stated:

Said controversy relates to the judicial construction of Section 7 of the Act, said section reading as follows:

"Section 7(a) 'No employer shall, except as otherwise provided in this section, employ any of his employees who are engaged in commerce or in the production of goods for commerce—

"(1) for a workweek longer than forty-four hours during the first year from the effective date of this section,

"(2) for a workweek longer than forty-two hours during the second year from such date, or

"(3) for a workweek longer than forty hours after the expiration of the second year from such date, unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed."

The plaintiff asserts:

1. That in working its employees in and about their actual working places eight hours per day for five days per week it is not employing said employees for a workweek longer than forty hours.

2. That no part of the time (unless some actual physical labor or service is during such time performed for the plaintiff) spent by its underground employees in the bath house or in going from and to the bath house to or from the portal, or to and from the underground manloading station from or to the portal, or to or from the actual working places of the employees from or to the underground manloading station, constitutes a part of the "workweek".

Otherwise stated, the plaintiff asserts that the Congress intended the word "workweek" to be construed as meaning the time actually spent by plaintiff's underground miners in or about their usual work, and did not intend to include a part of the "workweek" the time spent by such underground employees in being transported or walking to and from the places where they actually worked.

(3) That if the Congress did intend that traveling time of plaintiff's underground employees to and from the places where they actually worked should be considered as a part of the workweek, such legislation is violative of the Fifth Amendment to the Constitution of the United States.

Some of the defendants (being members of the International Union of Mine, Mill & Smelter Workers, affiliated with the C. I. O.) assert:

1. That the Congress intended to include within the meaning of the word "workweek" all the time from the moment the underground employees leave the bath house before the beginning of the day's work until the moment they enter the bath house at the end of the day's work.

Otherwise stated, that the entire time from the moment the underground employees leave the bath house before the beginning of the day's work until the moment they enter the bath house at the end of the day's work should be considered as a part of the "workweek", and that the underground employees should be paid for all such time and should be paid overtime for such portion of the "workweek", as thus defined, which exceeds forty hours since October 24, 1940, and forty-two hours from October 24, 1939, to October 24, 1940, and forty-four hours from October 24, 1938, to October 24, 1939.

Others of the defendants (being members of Unit No. 8, Brotherhood of Miners of Captive Ore Mines of Alabama), so plaintiff has been informed and believes, assert:

1. That the Congress intended to include within the meaning of the word "workweek" all the time from the moment the underground employees enter the bath house

before the beginning of the day's work until the moment they leave the bath house at the end of the day's work.

Otherwise stated, that the entire time from the moment the underground employees enter the bath house before the beginning of the day's work until the moment they leave the bath house at the end of the day's work should be considered as a part of the workweek, and that the miners should be paid for all such time, and should be paid overtime for such portion of the week's work, as thus defined, which exceeds forty hours since October 24, 1940, and forty-two hours from October 24, 1939, to October 24, 1940, and forty-four hours from October 24, 1938, to October 24, 1939.

The controversy involves a large sum of money because, if the assertions and contentions of the plaintiff are correct and its construction of the Act legal, it has paid to its underground employees all the compensation due them under the provisions of the Act. However, if the assertions and contentions of the underground employees are correct and their construction of the Act legal, plaintiff will be due its underground employees a large sum of money for overtime at a rate not less than one and one-half times the regular rate at which the underground employee was employed, which accrued indebtedness, if the estimates of the underground employees as to the amount of overtime is correct, will amount to approximately Two Hundred Fifty Thousand and No 100 ($250.00) Dollars, and if the plaintiff continues in the performance of its understanding and contention that only time actually spent by an underground employee working at and around the usual workplace constitutes the "workweek", the overtime and obligations of the plaintiff, therefore, will each day become increasingly larger. Without a determination of this controversy it is impossible for

plaintiff to know and ascertain whether or not it is violating the Act.

## V.

### The Opinion of the Administrator.

On March 23, 1941, the Administrator of the Wage and Hour Division, United States Department of Labor, announced a "Modified Portal to Portal Wage-Hour Opinion" and report, a complete copy of said opinion and report is hereto attached, marked Exhibit "A", and made a part hereof.

Plaintiff avers that said report was made on March 15, 1941, for release on Sunday, March 23, 1941, and said opinion was made on March 17, 1941, for release on Sunday, March 23, 1941; that promptly upon receiving information as to said opinion and report, plaintiff, with other employers like situated, filed with the Administrator its application for a reconsideration of said opinion; that a hearing on such application for reconsideration was held on Friday, March 28, 1941, before such Administrator; and that the petition for a reconsideration was taken under advisement. Plaintiff avers that on April 1, 1941, the Administrator denied the petitions for reconsideration but postponed the effective date from April 1, 1941, to May 1, 1941.

In said opinion the Administrator, in effect, expresses the opinion, and advises the plaintiff and other employers like situated, that the enforcement policy of the Division, effective May 1, 1941, will be that the workday in plaintiff's mines "starts when the miner reports for duty as required at or near the collar of the mine, and ends when he reaches the collar at the end of the shift".

Otherwise stated, it is the expressed opinion of the Administrator that the word "workweek" in said Act includes the entire portion of time spent by plaintiff's underground miners in going from the entrance or portal of the mine to the places where they actually work, and in returning from such places to said portal.

Plaintiff has been advised by counsel, and on such advice charges that the opinion expressed by the Administrator has no legal force; that the Administrator; under the provisions of the Act, has, and claims to have, no authority to judicially determine the legal effect of said provision of the Act; and that the opinion as thus expressed by the Administrator is erroneous and illegal. Said opinion is by no means a determining factor in this proceeding, but illustrates and emphasizes the bona fides of the controversy as herein set forth and the necessity for having said controversy fully, fairly, and promptly determined by this Court.

Said opinion serves as, and is claimed by defendants, to be, the principal support for their asserted construction of Section 7 of the Act.

There appears in said report (Exhibit "A") the following footnote:

"While the Wage and Hour Division Bulletins are not binding on the Courts, it may be anticipated that Judges will accord them especial weight; see United States v. American Trucking Associations, Inc., 310 U. S. 534. The Administrator has also from time to time issued statements concerning enforcement policy under which he proposes to proceed for reasons of administrative convenience." (Report, page 1, footnote 3.)

The institution and continuance in effect of the enforcement or threatened enforcement of said illegal and erroneous opinion of the Administrator subject the plaintiff to the peril of the heavy penalties of the Act.

In view of the foregoing, plaintiff, therefore, deems it material and relevant to make the following averments, which it asserts show or tend to show the illegality and incorrectness of the Administrator's opinion, and the lack of weight which should be accorded said opinion by this Court in declaring the issue of law herein sought to be declared.

Plaintiff avers that such averments where stated as facts are true, and where not stated as facts, plaintiff has been informed thereof, believes such information, and on such information and belief avers that they are true.

1. Plaintiff on information and believe alleges that prior to July 23, 1940, the Wage and Hour Division of the United States Department of Labor issued to the press the following release:

"First Mining Company Enjoined.

"The Cornucopia Gold Mines, a corporation with principal offices in Seattle, Washington, has been restrained from violations of the Fair Labor Standards Act, according to an announcement of the Wage and Hour Division, U. S. Department of Labor. This is the first Wage and Hour case in which judgment has been entered against a mining company. The corporation, operating a mine and mill near Cornucopia, Oregon, is engaged in the mining and concentrating of ore containing gold and silver.

"A judgment entered in the United States District Court for the Western District of Washington, Northern Division,

on May 3, provides for the payment of restitution. Approximately $18,000 in back wages for overtime worked is due some 283 employees.

"An important stipulation contained in the judgment is that time spent by employees in traveling from the 'portal', or entrance, of the mine to the 'face', or place where they work, and from the 'face' back to the 'portal' is to be deemed time worked. This means that hereafter the miners are assured of wages from the time they enter the mine until they leave it. Heretofore the miners were required to show only six hours of work on their time cards, although they were actually in the mine for eight hours. The mining company previously had not paid for the two hours consumed by the men riding into the tunnel in the mine property and going up or down the shafts to their place of work for the day."

That said release was printed in newspapers over the United States, including the newspapers of Birmingham, Alabama; and that the publication of said release was one of, if not the sole, motivating cause of the making by the defendant unions of the claims against the plaintiff for compensation to the underground miners for the time spent in going to and from their actual working places, and that (presented in flagrant violating of their written contract) these claims were the first insisted upon claims on the part of any underground employees for payment for time in going to and from their working places since mining became an industry in the State of Alabama.

The facts stated in said release above quoted were incorrect or incomplete. The true facts in reference to the Cornucopia case referred to in such release were that the employer, previous to the enactment of the Act, had

computed and paid wages on the "portal to portal" plan, and that following the enactment of the Act for the purpose of avoiding or coming within its terms, the employer began to compute and compensate its employees on the so-called "face to face" plan*, and charged as transportation time an arbitrary time set for transportation against the working time of all employees without reference to the time actually spent by such employees in being transported to and from their working places, thereby not counting as a part of the "workweek" the time spent in transportation, although previously it had been the custom to include such time as a part of the "workweek". That under these circumstances the decree referred to in the above released statement was entered *by consent* of the parties.

Upon the publication in the various papers of the country of the release of the Administrator above referred to in reference to such decision, there followed the claim of defendants, in accordance with the information thus incorrectly set out in such release, that transportation time should be included in their "workweek" for which they should receive compensation.

Plaintiff avers that, as hereinbefore and hereinafterwards set out more in detail, the situation in its mines in reference to prior custom, prior contracts, and the computation and payment of compensation was exactly the reverse from the facts that existed in the Cornucopia Gold Mine Company case.

2. Plaintiff alleges on information and belief that on or about Saturday, July 27, 1940, there was issued by

* Plaintiff uses the term "face to face" because of the fact that these terms have been used generally in describing plaintiff's method of operation. However, a more proper designation would be "working place to working place".

the United States Department of Labor, Wage and Hour Division, for release morning paper, Saturday, July 27, 1940, R-298, said release stating in substance that "two mining determinations were announced, one dealing with the status of lessees in mines and the other with working time in bituminous coal mines." In reference to the "determination" dealing with working time in bituminous coal mines, the release stated:

"Colonel Fleming announced that on the basis of an inquiry submitted by the bituminous coal mining industry, the Wage and Hour Division in carrying out its enforcement duties in that industry will accord great weight to any reasonable standards for determining working time which represent the prevailing customs and practices in the particular industry and are supported by a long history of *bona fide* collective bargaining agreements. In view of the circumstances described by the industry in submitting its inquiry, Colonel Fleming announced that practice of computing working time on a 'face to face' basis in the bituminous coal mining industry would not be unreasonable. Colonel Fleming explained the term 'face to face' to mean the productive work performed after the miner arrives at his usual working place, excluding the time spent in traveling from the portal or entrance of the mine to the place of work and the time spent in traveling from the portal or entrance of the mine to the place of work and the time spent in returning from the working place to the portal in the evening. The Administrator added that the determination in the bituminous coal mining industry should not be considered to apply to any mining operations where the traditional practice of computing hours worked differs from the custom in the bituminous coal mining industry."

3. Plaintiff alleges on information and belief that the Wage and Hour Division, United States Department of Labor, issued for release Wednesday, September 18, 1940, G-81, an address scheduled for delivery of Colonel Fleming (Philip B.), Administrator, Wage and Hour Division, United States Department of Labor, before the American Mining Congress, Colorado Springs, Colorado, Wednesday, September 18, 1940, and that in said address the Administrator stated, among other things:

"1. Must the time spent by the underground worker in traveling from the portal to the face be counted as time worked?

"2. Must time spent at lunch underground be considered as time worked?"

In reference to the matter herein involved, the Administrator, among other things, said:

"The portal-to-portal matter also has been presented to us by the bituminous coal mining industry. In response to inquiry I said that the Wage and Hour Division, in carrying out its enforcement duties in that industry, will accord great weight to any reasonable standards for determining working time which represent the prevailing customs and practices in the industry and are supported by a long history of *bona fide* collective bargaining agreements. In view of the circumstances described by the industry in submitting its inquiry, I announced that the practice of computing working time on a 'face-to-face' basis in bituminous coal mining would not be unreasonable. The term 'face-to-face' was explained to mean the productive work performed after the miner arrives at his usual working place, excluding the time spent in traveling from the portal or entrance of the mine to the

place of work, and the time spent in returning from the working place to the portal at the end of the shift. This determination in the bituminous coal mining industry should not be considered to apply to any mining operations where the traditional practice of computing hours worked differs from the custom in bituminous coal mining. In the Cornucopia case, for example, custom and tradition had long recognized the portal-to-portal basis of reckoning time worked.

"We are not yet disposed to take any particular position as to whether the half hour spent eating lunch underground may be deducted from hours worked. The problem is a very difficult one because the employee is required to eat under very unfavorable conditions and is subject to many of the hazards of his job while eating. On the other hand, we recognize that the employee does have time off in order to have lunch and an argument can be made that such time need not be considered as hours worked. But as I say, the Division is not prepared at the present time to make any definitive determination on this question."

4. Plaintiff alleges that at various times from July, 1940, until the middle of October, 1940, during which time the Wage and Hour Division of the United States Department of Labor had under investigation with full cooperation of the plaintiff the claims as presented by the unions that the underground miners were entitled under Section 7 of the Act to be compensated for the time spent in going to and from their work places, plaintiff was on several occasions informed by the representatives of the Administrator conducting or taking part in such investigations that in reaching a conclusion as to the claims of the unions the Department would accord great weight to the prevailing customs and practices as sup-

ported by the history of bona fide collective bargaining agreements.

5. Plaintiff alleges on information and belief that hearings were held in Salt Lake City, Utah, conducted by Harold Stein as the representative of the Administrator, on December 11 and 12, 1940; that said hearings related substantially, if not altogether, to the non-ferrous mines of the West and had no proper relationship either to the iron ore mines of plaintiff and of other operators in the State of Alabama or to the iron ore mines as constituting a national industry; that hearings were held in the City of Birmingham, Alabama, conducted by the said Harold Stein, on January 14 and 15, 1941; that said hearings related solely to the limestone mine and iron ore mines of the plaintiff, of the Tennessee Coal, Iron and Railroad Company, Sloss-Sheffield Steel & Iron Company, and Woodward Iron Company as operated in Jefferson County, State of Alabama; that the evidence and information given at such hearing established without dispute the fact that since mining has been an industry in Alabama, down to and including the present time, it has been the universal and unvarying custom in all underground mines (coal, iron, limestone, and all others) to compute and pay underground employees compensation on the basis of "working place to working place", and that there has never been computed or paid any compensation for the time spent in transportation or in going to and from the actual working places, and that all contracts, including those now in existence with organizations representing the employees, expressly provide for the computation and payment of underground employees on the basis of "working place to working place".

6. Plaintiff alleges that neither in the hearings at Salt Lake City, Utah, or Birmingham, Alabama, so far as

plaintiff has been able to acquire knowledge, was any evidence given or statements taken relating to any ore mines in any other portion of the United States other than the Birmingham District, although plaintiff, on information and belief, charges that the percentage of iron ore produced in the Birmingham District is less than ten (10) percent of the total production in the United States of America, and of the total production there has never been, except in a few mines (not more than one and one-half (1½) percent of the total, in states controlled by local statutes) in custom and practice the so-called "portal to portal" plan as sought to be instituted by the Administrator as representing his construction of Section 7 of the Act.

7. The plaintiff alleges that the opinion (Exhibit "A") is based upon the report (Exhibit "A") hereinafter referred to, and that said report contains the following averments:

"(1) *Face to face.* The miners are paid only for working time at the face and excluding lunch. Except where the shift was measured only by the work performed, this is probably the oldest method of computing the shift, but the record indicates that only a small percentage of underground metal miners are still paid on this basis. The only important group of mines now operating on a face to face basis are those in Alabama.

"(2) *Collar to collar.* Far more common than face to face in modern practice, and universal in the states of Utah and Arizona, where it is required by law, is the collar to collar basis. On this basis, the miner is paid for all time from the moment he descends from the surface to the moment he returns to the surface, except that in some mines the lunch period is not paid for.

Characteristically, though not invariably, the collar to collar shift is eight hours. Ordinarily lunch is eaten on the company's time, but a fixed lunch period is normal, nevertheless."

"* * * The great majority of metal miners nowaday work in mines where they are paid for part or all of their underground travel time."

The above factual statements are incorrect. There is not in the States of Alabama any appreciable production of gold, silver, copper, lead, and zinc (the metals for the most part referred to and covered by said report). The only ferrous mines in Alabama referred to and included in said report are the iron ore mines (although the coal mines and other mines in Alabama have always followed the same method of computing and paying wages as the iron ore mines follow). The method of mining and production of iron ore has no real similarity to that of the metals above referred to, the mining of which, so far as said report is concerned, is located principally in the Western States. The ore mines of Alabama do not in any way come in competition with said metal mines; and there is no practical, logical, or historical reason for considering the ore mines of Alabama in relation to or in connection with the metal mines above referred to.

The ore mining industry of the United States is one of tremendous size and importance. In the year 1940 there was produced in the United States a total of approximately 76 million tons of iron ore. Of this total amount approximately 63 million tons or 84.2% were produced by the mines located in what is known as the Lake Superior ore mining territory, approximately 7 million tons or 9.5% were produced by the ore mines of Alabama, approximately 3 million tons of 4.7% were produced by the iron

ore mines of New York, New Jersey, and Pennsylvania, and 1½ million tons or 1.6% were produced by the iron ore mines of Utah and Wyoming. Of the small amount produced in the Western states of Utah and Wyoming, approximately 90% thereof is produced in the State of Utah, which is controlled by a state statute requiring computation and payment of compensation on the so-called "portal to portal" basis.

Instead of, as recited in said report, the "greater majority of metal miners nowadays working in mines being paid for part or all of their underground travel time" and the "only important group of mines now operating on the 'face to face' basis are those located in Alabama", substantially all of the iron ore mines in the United States have always been, and are at the present time, operated upon and the compensation of their employees computed and paid on the "working place to working place" plan. In approximately 100% of the mines of the United States producing iron ore, there is not now and has never been in operation the so-called "collar to collar" plan. Even in the non-ferrous mines there has never been in existence, except in a negligible degree, the "portal to portal" plan.

Plaintiff avers that the basis for the opinion as given in the report and the reason therein assigned for applying the measuring rod of "face to face" to the bituminous coal mines of the United States and the measuring rod of "portal to portal" or "collar to collar" to the iron ore mines of the United States is not supported by the facts; that no real distinction can be made between the bituminous coal mining industry and the iron ore mining industry; and that the correct construction of Section 7 of the Act as applied not only to these industries, but to all other industries, is that the word "workweek"

was used by the Congress as meaning actual work at the usual working places, and it was not the intention of the Congress to include in the word "workweek" time spent by an employee in going to and from his place of work, during which time he is not in any way engaged in the performance of any physical labor or actual service for the employer.

## VI.

Necessity for the Relief of a Declaratory Judgment.

1. The Act contains, among others, the following provisions:

"Section 15:

"* * * it shall be unlawful for any person—

"(1) to transport, offer for transportation, ship, deliver, or sell in commerce, or to ship, deliver, or sell with knowledge that shipment or delivery or sale thereof in commerce is intended, any goods in the production of which any employee was employed in violation of section 6* (minimum wages) and section 7 (maximum hours), or in violation of any regulation or order of the Administration issued under Section 14 (relating to learners, apprentices, etc.) * * *;

"(2) to violate any of the provisions of Section 6 (minimum wages) and section 7 (maximum hours), or any of the provisions of any regulation or order of the Administrator issued under Section 14 (relating to learners, apprentices, etc.);

"(3) to discharge or in any other manner discriminate against any employee because such employee has filed

* Parenthesis and emphasis herein are ours.

any complaint or instituted or caused to be instituted any proceeding under or related to this Act, or has testified or is about to testify in any such proceeding, or has served or is about to serve on any industry committee;

"(4) to violate any of the provisions of Section 12 (prohibition against child labor);

"(5) to violate any of the provisions of Section 11(c) (relating to reports, etc.), or to make any statement, report, or record filed or kept pursuant to the provisions of such section or of any regulation or order thereunder, knowing such statement, report, or record to be false in a material respect.

"Section 16:

(a) Any person who willfully violates any of the provisions of Section 15 shall upon conviction thereof be subject to a fine of not more than $10,000, or to imprisonment for not more than six months, or both. No person shall be imprisoned under this subsection except for an offense committed after the conviction of such person for a prior offense under this subsection.

"(b) Any employer who violates the provisions of section 6 or section 7 of this act shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. Action to recover such liability may be maintained in any Court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated, or such employee or employees may designate an agent or representative to maintain such

action for and in behalf of all employees similarly situated. The Court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action."

As hereinbefore alleged, the plaintiff, under its assertion that "workweek" means time spent at the underground miners' usual working places, has, for several years prior to the enactment of the Act, employed, and now employs, its underground miners at their usual places of work forty hours per five-day week. It, therefore, follows that if the assertions and contentions of either the Administrator or of any class of plaintiff's underground mining employees are correct that plaintiff will be subject, among other things, first, to the penalties as set forth in section 16(a); second, to the unpaid overtime compensation and to an additional equal amount as liquidated damages and a reasonable fee to be paid to the attorneys of such underground employees who bring suits, together with the costs of the actions; and, third, to the costs, expenses, and inconvenience of a multiplicity of actions, depending upon how many of said underground mining employees of the plaintiff institute such legal proceedings.

2. *Threatened litigation:*

Plaintiff is in immediate peril of threatened litigation, because:

A. Defendant, Raimund Local 121, an unincorporated association affiliated with the International Union of Mine, Mill and Smelter Workers (a C. I. O. organization), on or about October 5, 1940, presented to the plaintiff a written officially adopted resolution and statement asserting

that the plaintiff had required its underground employees "to be on the premises on duty and in the performance of their work for the company ten hours per day, totaling fifty hours per 'workweek'" (the claim being based upon the alleged statement that two hours were spent on the premises of the plaintiff in time spent in the bath house or in transportation or walking to and from the working place, and demanding payment by the plaintiff of "all back time since the effective date" of the Act. A copy of said resolution is hereto attached, marked Exhibit "B", and made a part hereof.

B. Defendant, Raimund Local 121, an unincorporated association affiliated with the International Union of Mine, Mill and Smelter Workers (a C. I. O organization), by and through its duly constituted and authorized officers, and through its legal counsel, asserted and contended in the conference held by the Wage and Hour Division of the United States Department of Labor in Birmingham, Alabama, on January 14 and 15, 1941, that under the provisions and terms of the Act it was entitled to have counted as a part of the "workweek" of its members approximately two hours claimed to have been spent each workday from the moment they leave the bath house before the beginning of the day's work until the moment they enter the bath house at the end of the day's work.

C. Defendant officers and members and other members of said defendant, Raimund Local 121, an unincorporated association affiliated with the International Union of Mine, Mill and Smelter Workers (a C. I. O. organization), and defendants Jones, Pegues, and Allen have for several months past, and up to and including the time of the filing of this petition, made many and repeated statements and threats to institute and prosecute

suits against the plaintiff under the provisions of the Act for the purpose of enforcing the payment by plaintiff of overtime (claimed as above set forth) at the rate of one and one-half times the regular rate at which plaintiff's underground miners were employed, together with attorneys' fees and costs.

D. Plaintiff has been informed, believes such information, and on such information and belief charges that said defendant, Raimund Local 121, an unincorporated association affiliated with the International Union of Mine, Mill and Smelter Workers (a C. I. O. organization), has employed attorneys and authorized and directed them to proceed in the prompt bringing of such legal proceedings as may be necessary to enforce against the plaintiff their claim for such overtime payments, together with attorneys' fees and costs.

E. Defendant officers and members and other members of all of said defendant Local have for several months past and up to and including the date of the filing of this petition made many and repeated statements and threats to institute and prosecute suits against the plaintiff under the provisions of the Act for the purpose of enforcing the payment of the alleged overtime (claimed as above set forth) at the rate of one and one-half times the regular rate at which plaintiff's underground miners were employed, together with attorneys' fees and costs.

F. Plaintiff has been informed, believes such information, and on such information and belief charges that on Sunday, March 23, 1941, defendant Van D. Jones, Executive Board Member of District No. 5 of the International Union of Mine, Mill and Smelter Workers, and the principal administrative officer of the said Union in the State of Alabama, referring to the "portal to portal"

opinion of the Administrator, publicly announced in the press that the red ore miners of the Birmingham District, members of his union, would at once seek to recover a million dollars in back wages claimed to be due from the plaintiff and other operators of iron ore mines in Jefferson County, Alabama, and that approximately 6000 Alabama red ore miners would bring litigation for the purpose of enforcing the collection of the claimed amounts.

Wherefore, Plaintiff asserts that it is threatened with the immediate institution and prosecution of a multiplicity of suits involving large sums of money, and unless the declaration herein prayed for is granted, the plaintiff will be faced with great, if not irreparable, injury.

VII.

Probability of Great, If Not Irreparable, Injury.

If the declaratory judgment herein prayed for is not granted, the plaintiff is in immediate peril of suffering great and irreparable injury because (among other things):

1. Of the vexation, cost, and expense of a multiplicity of suits.

2. Of the delay in the settlement and determination of the controversy which will necessarily follow if the prompt remedy afforded by the Declaratory Judgment Act and Rule 57, Rules, District Courts of the United States, is not applied and the final determination of the legal question involved is left to the adjudication of such threatened suits, the bringing of which is immediately imminent;

3. Of the fact that, under the provisions of the Act, the threatened suits for overtime payments may be brought in different jurisdictions, in Federal Courts or in State Courts, and will be encumbered with the costs and expenses of such litigation and the delays incident to final determination and the changes of different adjudications by different jurisdictions;

4. Of the probability of cessation in work, and losses and damages and ill feelings by reason of labor disturbances, which will almost inevitably follow if the plaintiff fails to comply with the present illegal and erroneous opinion of the Administrator; or if in attempting to comply it is forced to insist on a reduction of the compensation now being paid its underground employees.

5. Of the great expense that the plaintiff will be put to in changing its operations from the "working place to working place" plan to the "portal to portal" plan, in the event, by reason of the Administrator's opinion and the perils of not complying therewith, it feels compelled to endeavor to comply therewith;

6. Of the claims of the different individual employees and the different classes of employees, being so different as to impose upon the plaintiff the perils and uncertainties incident to different contentions, and adjudications in reference to the legal issues herein sought to be declared.

## VIII.

### Perils of Decision.

Unless the plaintiff can obtain a prompt declaration on the issue of law here presented, it is confronted with

unusual and immeasurable perils of making a decision, because:

1. If it, under advice of counsel, decides to stand by its construction of the law, and the Court should ultimately decide that the assertions either of the Administrator or of individual employees or any of the classes of plaintiff's employees are correct, plaintiff would be subjected:

A. To the costs, expenses, and heavy penalties which would be imposed under Section 16(b) of the Act.

B. To the penalties of fine and imprisonment imposed by Section 16(a) of the Act.

C. To having the Administrator, under the warning given in his opinion of March 23, 1941 (Exhibit "A" hereto attached) proceed against it by injunction proceedings under Section 17 of the Act, and the prevention of the shipment in interstate commerce of its manufactured products.

2. If, on account of the perils incident to standing on its conviction under advice of counsel, it feels impelled on account of the uncertainties and delays of litigation to accept and comply with the opinion either of the Administrator, or with the demands and assertions of defendants, plaintiff will probably, and in many respects certainly, be subject to or have imposed upon it (among other things):

A. The payment of large sums of money to its employees for overtime as contended for by them.

B. The planning and institution of new methods of operation which will result in great loss and damages to the plaintiff because:

(a) compliance will result in a large reduction in production if the "portal to portal" plan should be put in effect and the underground employees could not remain underground more than eight hours per working day, which would mean that the time spent in going to and from the working places or from the bath house would have to be subtracted from the time now spent in actual work at the actual working places, thereby reducing the actual day's work time from eight hours to five hours or six hours, depending upon the correctness of the contentions of the various classes of employees.

(b) It would greatly increase plaintiff's cost per ton of ore produced.

(c) It would place the plaintiff at a serious disadvantage with its competitors and would deprive it of a substantial portion of its existing markets.

(d) As an illustration of the increased cost of which would fall upon the plaintiff, plaintiff has carefully calculated what the effect of putting the opinion of the Administrator into effect at its Raimund ore mines would be, and avers:

(1) Should the plaintiff continue to operate said mine on its present and long-existing custom and practice of five days per workweek (eight hours per workday), and continue to receive from its underground employees eight hours' actual work at their usual working places, and pay as overtime the approximate two hours consumed in going to and from the working places, the increased cost per ton of iron ore per ton would be twenty-seven cents.

(2) Should the plaintiff operate the mine four days per week instead of five days per week, it could comply with the opinion of the Administrator without exceeding forty hours per workweek. The increase of cost per ton, if this plan of operation should be put into effect in order to comply with the Administrator's opinion, would be twenty-three cents per ton of iron ore.

(3) Should the Company be able by changing its method of transportation by the purchase at large cost of additional equipment and by arranging a schedule of transportation so that each employee would have a definite time for entering and leaving the mine, the increase in cost would be large and the difficulties of operation great.

(e) Not only would the cost per ton of ore produced be greatly increased, but the percentage of loss in tonnage produced would be large, and the loss of production would not only be to the damage of the plaintiff but, by reason of the bonus which the underground mining employees receive upon the amount of their production, the loss of wages upon employees would be substantial.

(f) The plaintiff's cycle of operations, computation of wages, payment of wages, methods and forms of bookkeeping, rules and regulations governing employees, method and time of transportation, assembly and delivery of tools, powder, and equipment, and activities of service and surface crews have all been by long and unvaried custom, related to and based upon the "working place to working place" plan, and to change this method would be difficult and costly.

## IX.

## Great Weight Should Be Accorded to Any Reasonable Standards Which Represent the Prevailing Custom

and Practice in the Particular Industry, and Which Are Supported By a Long History of Bona Fide Collective Bargaining Agreements.

The reasonableness of plaintiff's contention is supported by the following, among other, facts:

1. It has been for more than fifty years the unvarying and continuous custom in plaintiff's ore mines, as well as in all other ore mines in Alabama, for the wages of underground ore miners to be computed and paid on the "face to face" basis.

2. It has been for more than fifty years the unvarying and continuous custom in plaintiff's ore mines, as well as in all other ore mines in Alabama, that underground ore miners should not have their wages computed or paid for the necessary time in going from and to the surface and to and from their underground working places.

3. The same unvarying and continuous custom, as set forth in 1 and 2 above, has for more than fifty years existed in all underground coal mining operations of the plaintiff and of all other coal operators in the State of Alabama.

Plaintiff alleges that there can be, under conditions existing in the State of Alabama, no logical or possible differentiation between underground ore mines and underground coal mines, so far as the question under consideration is concerned.

4. The opinion (and enforcement thereunder) of the Administrator in reference to the bituminous coal mines is inconsistent with his opinion in reference to the iron ore mines.

5. The previous statement and interpretation of Section 7 of the Act by the Administrator are inconsistent with his present opinion in reference to the iron ore mines.

6. The laws of the State of Alabama during all of the period of time herein referred to have recognized in garnishment proceedings, wage suits, and other related matters that the payment and computation of wages in underground mines should be on the "face to face" basis.

## X.

### Petition and Prayer.

Wherefore, Plaintiff petitions and prays this Court to make and enter a decree and judgment declaring the rights of the respective parties hereto in the premises and more particularly plaintiff's rights as asserted in the following specific propositions:

### A.

Has the plaintiff, in following the work schedule and procedure as hereinbefore in Section II hereof set out, compiled with the provisions of Section 7 of the Act?

### B.

Did the Congress in the enactment of Section 7 of the Act intend that the "workweek" of plaintiff's underground employees should include any portion of their time spent in being transported or walking to and from their usual working places and while not engaged in any physical work or service for the plaintiff?

C.

Is the plaintiff indebted in any sums to its underground employees for the time spent by them at any time since the enactment of the Act and embracing (without any physical work or service for the plaintiff being done during such time)—

(a) Any time spent in the bath house;

(b) Any time spent in going from and to the bath house to and from the portal;

(c) Any time spent in being transported from and to the portal to and from the underground manloading station;

(d) Any time spent in walking to and from their usual working places from and to the underground manload station?

E.

What did the Congress intend in so far as the method of operation of plaintiff as hereinbefore in Section II hereof set forth are concerned by the use of the word "workweek"?

F.

Are the assertions of the plaintiff as herein set forth as to the intentions of Congress in the use of the word "workweek" legal and correct?

Premises Considered, Plaintiff petitions and prays that the Court adjudge and answer, separately and severally,

each of the questions and specifically set forth in the above paragraphs numbered A to F, both inclusive, and determine and declare that the plaintiff is not indebted to the defendants and its underground mining employees as compensation for any time spent by them since the enactment of the Act in the bathhouse or in going from and to the bathhouse to or from the portal or to and from the underground manloading station from or to the portal or to and from the actual working places of the employees from or to the underground manloading station (during which time said employees performed no physical labor or service in connection with their actual work), and that said defendants and their agents, representatives, and all underground employees of the plaintiff made parties defendant hereto as a class be restrained and enjoined from prosecuting any suit or claim of any nature whatsoever against plaintiff for any additional wages or compensation claimed to be due them under the terms and provisions of the said Act for any portion of their time spent as above set forth, and plaintiff prays for a general declaratory judgment with reference to the questions presented by this petition, and a judgment against the defendants for costs herein, and if the plaintiff be mistaken in the relief prayed for, plaintiff hereby prays for such other, further, more different or general relief as to the Court may seem meet, just, and proper, the premises considered.

Plaintiff prays that in accordance with rule 57, District Courts of the United States, the Court order a speedy hearing of this action and advance it on the docket.

XI.

Alternative Prayer.

If for any reason this Court should decline to take jurisdiction hereof under the provisions of the Federal

Declaratory Judgment Act (Section *1*(g) hereof), plaintiff in the alternative prays that this Court assume, take, and exercise equity jurisdiction because of the existence of the facts herein alleged which confer upon said Court such equity jurisdiction in that it, separately and severally, appears therefrom that such jurisdiction should be exercised because:

(a) It is essential to the protection of the rights asserted by the plaintiff herein;

(b) It is essential to secure a determination of the question arising hereunder under a law regulating commerce;

(c) It is essential to the protection of the plaintiff from the costs, expense, inconvenience, and vexation of a multiplicity of suits;

(d) It is essential to protect the plaintiff against irreparable damage;

(e) It is essential to protect the plaintiff against the penalties of an Act of the Congress through an illegal and improper application of the provisions of such Act.

(f) It is essential to protect the rights of plaintiff on account of the inadequacy of any remedy at law:

(g) It is essential for the determination of plaintiff's assertion that the defendants are estopped by the terms of their written contract and by their conduct from asserting their claims for compensation for time in going to and from their places of work;

(h) It is essential to determine plaintiff's claim for and to grant plaintiff a specific performance of defendants' written contract.

Wherefore, Plaintiff prays that this Court will issue a temporary restraining order or preliminary injunction restraining and enjoining said defendants and their agents and representatives and all underground mine employees of the plaintiff made parties hereto as a class from instituting, maintaining, or prosecuting any other action or proceeding to determine the rights of this plaintiff or of the defendants under the averments of this bill of complaint, and that each of said defendants be required to propound and assert their respective rights, if any they have, to this Honorable Court; and plaintiff further prays, separately and severally, that on final decree it be ordered, adjudged, and decreed by the Court:

1. That plaintiff is not indebted to any of its underground mine employees in any sum under the provisions of the Fair Labor Standards Act of 1938;

2. That defendants are not entitled to recover from plaintiff any compensation under the provisions of the Fair Labor Standards Act of 1938;

3. That plaintiff is not indebted in any sums to any of its underground mine employees for the time spent by them at any time since the enactment of the Act and embracing (without any physical work or service for the plaintiff being done during such time)—

(a) Any time spent in the bathhouse;

(b) Any time spent in going from and to the bathhouse to and from the portal;

(c) Any time spent in being transported from and to the portal to and from the underground manloading station:

(d) Any time spent in walking to and from their usual working places from and to the underground man-loading station;

4. That defendants are estopped by their written contract and by their conduct from asserting any claim for or recovering any compensation for time spent in going to and from their place of work;

5. That plaintiff is entitled to the specific performance of the written contract between plaintiff and the defendants.

6. That plaintiff go hence with its reasonable costs herein incurred.

Plaintiff submits itself to the jurisdiction of the Court and offers to do full equity.

T. F. PATTON & BORDEN BURR
and
BENNERS, BURR, McKAMY & FORMAN,
Attorneys for Plaintiff.

Birmingham, Ala.

Verification.

State of Alabama,
Jefferson County.

Personally appeared before me, the undersigned authority in and for the above named State and County, N. E. Thompson who being first duly sworn, on oath deposes and says that he is the Superintendent of Ore Mines of the Republic Steel Corporation, a corporation, named as

plaintiff in the foregoing petition, and as such Superintendent and agent is authorized to make this affidavit; that he has read over the facts therein set forth; that he is familiar with the facts as therein stated; and that said facts as therein stated are true except where stated on information and belief and where so stated he verily believes the same to be true.

N. E. THOMPSON.

Sworn to and subscribed before me this 3 day of April, 1941.

MARGARETTE KENNEDY,
(Seal) Notary Public.

Filed April 4, 1941.

197 EXHIBIT A.

Exhibit A to the petition of the Republic Steel Corporation is a copy of the Opinion and Report of the Administrator of the Wage and Hour Division of the United States Department of Labor, marked "For Release Sunday, March 23, 1941," and is in all respects identical with Exhibit A to the petition of the Tennessee, Coal, Iron & Railroad Company, heretofore set out on page 76 of this transcript.

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198 EXHIBIT B.

Copy.

Bessemer, Alabama, October 12, 1940.

In Re: Raimund Local No. 121, of the International Union of Mine, Mill and Smelter Workers, District No. Five, an Affiliate of The Bessemer Smelters Council.

Whereas, there now exists a controversy between this Local and the Republic Iron & Steel Company, at its mines near Bessemer, Alabama, and this controversy is of long standing and deals with the travel pay of our members by the above mentioned Company at its iron ore mines in its production and maintenance departments; and these employees are required to report at the mouth or collar of the mines at 6 o'clock, A. M. in the morning for the purpose of being loaded into mantrips and other methods of entering the mines, they being underground workers; and at the mouth or collar of the mines are checked in at six o'clock and immediately given supplies, tools, equipment and instructions, and then they proceed to their working places, which is approximately 2 miles from the mouth or collar of the mines and down under the ground, which requires and consumes approximately one hour's time before they then arrive at their usual working places; all of this time being spent on the premises of the Company, and after the men are checked in and given supplies, equipment and instructions then they proceed to their working places to perform their usual tasks, after which they return to the mouth or collar of the mines arriving there about four o'clock in the afternoon, and are checked out, thus requiring the employees to be on the premises on duty and in the performance of their work for the company ten

(10) hours per day in the mines, totaling fifty hours per work week, and

Whereas, immediately after our Union was set up, and ever since that time, we have been protesting the travel pay of our members in this mine, and this controversy is based upon the time spent by our members on the premises of the Company each work week and being in excess of the hours required to work under the law, and as we understand it, in violation of the rules and law, and which time amounts to approximately 10 hours per workday, and employees affected by this condition numbering approximately 600. And we further believe that in view of the fact that the Fair Labor Standards Act was passed primarily for the purpose of reducing excessive required hours on the premises of the employer during any given work week, and

Whereas, the Fair Labor Standards Act is recognized and being complied with in many instances without any controversy on the part of the employers, but notwithstanding that fact and in the face of many rulings by the Wage & Hour Board supporting our position and conditions of work, we are still required by the said Company to be on the premises of the Company many hours in excess of the workweek, and for which we receive no pay.

Therefore: Be it Resolved by this Local in regular meeting assembled that we authorize and request our local and National officers to immediately bring about a correction of these conditions and require the Company to immediately comply with the Fair Labor Standards Act from now on, and also require the Company to pay all back time since the effective date of this law.

And we further authorize our officers to bring this Resolution to the attention of the Hon. Robert P. Amis, Regional Director of the Wage & Hour Division of the Department of Labor in Birmingham, Alabama, and also with Col. Philip B. Fleming, Administrator of the Wage & Hour Division of the Department of Labor, Washington, D. C. And our officers both local and National are further authorized to take such steps as may be necessary and expedient, by negotiations or suit, in order to bring about a speedy conclusion of this controversy.

Be it further resolved that copies of this Resolution be immediately forwarded to all interested parties.

This is to certify that the above is a true and exact copy of a Resolution unanimously adopted by Local No. ... in its regular meeting of October 12, 1940.

(S.) LOUIS TARRANT,
As President of Local #121 of
I. U. M. M. & S. W.

Attested by:
(S.) B. G. STEPHENS,
As Recording Secretary.
(Seal)
(I. U. M. M. & S. W.)
(Raimund Local #121)
(Bessemer, Ala.)

MOTION OF PETITIONER-PLAINTIFF REPUBLIC STEEL CORPORATION FOR A TEMPORARY RESTRAINING ORDER OR PRELIMINARY INJUNCTION.

201 (Civil Action No. 5234.)

Comes the plaintiff in the above entitled cause, and adopting the allegations of its bill of complaint as a part of this motion, moves the Court to issue herein a temporary restraining order or preliminary injunction restraining and enjoining said defendants and their agents, representatives, and all other underground employees of the plaintiff made parties defendant hereto as a class from prosecuting any suit or claim of any nature whatsoever against plaintiff for any additional wages or compensation claimed to be due them under the terms and provisions of the said Act for any portion of their time, including the lunch period, spent in being transported or going to and from their actual places of work, and that the terms of said injunction be as set forth in prayer of said bill of complaint.

BORDEN BURR
and
BENNERS, BURR, McKAMY & FORMAN,
Attorneys for Plaintiff.

Filed April 4, 1941.

ORDER SETTING MOTION OF PETITIONER-PLAINTIFF REPUBLIC STEEL CORPORATION FOR TEMPORARY RESTRAINING ORDER OR PRE-PRELIMINARY INJUNCTION OF HEARING.

202 (Civil Action No. 5234.)

This matter coming on to be heard on the motion and prayer of the plaintiff for the issuance of a temporary restraining order or preliminary injunction, it is ordered by the Court that said motion be, and the same hereby is, set for hearing in open Court on the 17th day of April, 1941, at 10 o'clock A. M.

It is further ordered that service of a copy of the bill of complaint herein, of said motion and of this order be made upon the defendants in accordance with Rule 5(b) of the Rules of Civil Procedure, and that such service be made not less than five (5) days before the time set for hearing.

This 4th day of April, 1941.

T. A. MURPHREE,
Judge.

Filed April 4, 1941.

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203 RETURN OF SERVICE OF PROCESS ON PETITION OF REPUBLIC STEEL CORPORATION, omitted from the printed record, pursuant to Rule 23 of this Court.

## TEMPORARY RESTRAINING ORDER.

204 Civil Action No. 5232.

This cause coming on to be heard on this the 12 day of April, 1941, on the application of certain of the defendants that the hearing heretofore set herein for April 17, 1941, on plaintiff's motion for a restraining order or preliminary injunction be continued, and said application being considered, it is ordered and decreed by the Court:

1. That said hearing previously set for April 17, 1941, be, and the same hereby is, continued;

2. That said cause be, and the same hereby is, set for hearing and for trial on the merits for Monday, June 23; 1941, at 10 o'clock A. M.;

3. That pending said hearing the status quo of said case shall be maintained and that said defendants and the underground employees of the plaintiff as set forth and described in the bill of complaint and their agents and representatives be, and they hereby are, temporarily restrained from instituting and prosecuting any suits in any Court relative to the matters and things in the bill of complaint set forth.

It is further ordered that attorneys for plaintiff be, and they hereby are, expressly authorized and directed to make service of this order upon defendants or their attorneys.

T. A. MURPHREE,
Judge.

Filed April 14, 1941.

On April 12, 1941, an identical order was entered and filed in Civil Action No. 5234—Republic Steel Corporation v. Raimund Local No. 121, et al., and on April 14, 1941, an identical order was entered and filed in Civil Action No. 5233—Sloss-Sheffield Steel & Iron Company v. Sloss Red Ore Local No. 109, et al.

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206 ORDER CONTINUING TEMPORARY RESTRAINING ORDER.

(Civil Actions Nos. 5232, 5233 & 5234.)

The temporary restraining order heretofore issued in the above entitled causes for good cause shown, is hereby continued in force and effect for ten days from the date hereof.

Dated this 24th day of April, 1941.

T. A. MURPHREE,
District Judge.

Filed April 24, 1941.

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207 ORDER CONTINUING TEMPORARY RESTRAINING ORDER.

(Civil Actions Nos. 5232, 5233 & 5234.)

The temporary restraining order heretofore issued in the above entitled causes for good cause shown, is hereby continued in force and effect for ten days from the date hereof.

Dated this 5th day of May, 1941.

T. A. MURPHREE,
District Judge.

Filed May 5, 1941.

208 ORDER CONTINUING TEMPORARY RESTRAINING ORDER.

(Civil Actions Nos. 5232, 5233, & 5234.)

The temporary restraining order heretofore issued in the above entitled causes for good cause shown, is hereby continued in force and effect for ten days from the date hereof.

Dated this 14th day of May, 1941.

T. A. MURPHREE,
District Judge.

Filed May 14, 1941.

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209 ANSWER OF DEFENDANTS AFFILIATED WITH AMERICAN FEDERATION OF LABOR.

(Civil Action No. 5232.)

Come the above named defendants and, for answer to the petition of complaint heretofore filed in this cause, say:

1.

Defendants admit the averments in Section I of said complaint as to allegations of jurisdiction of the Court.

2.

Defendants are without knowledge or information sufficient to form a belief as to the truth of the averments contained in Section II of said complaint.

3.

Defendants are without knowledge or information sufficient to form a belief as to the truth of the averments contained in Section III of said complaint.

4.

Defendants are without knowledge or information sufficient to form a belief as to the truth of the averments in Section IV of said complaint.

5.

Defendants are without knowledge or information sufficient to form a belief as to the truth of the averments in Section V of said complaint.

6.

Defendants deny the averments of Section VI of said complaint.

7.

Defendants deny the averments of Section VII of said complaint.

8.

Defendants deny the averments of Section VIII of said complaint.

9.

Defendants deny the averments of Section IX of said complaint.

10.

Defendants are without knowledge or information sufficient to form a belief as to the truth of said averments in Section X of said complaint.

11.

Defendants deny that petitioners are entitled to the relief prayed for in Sections XI and XII of said complaint.

12.

The petition or complaint fails to state a claim against defendants upon which relief can be granted.

Cross-Claim.

And defendants, hereinafter named, hereby present and file a cross-claim against the plaintiff, Tennessee Coal, Iron & Railroad Company, a corporation, and set forth the following facts, upon which said cross-claim is based:

First. That this cross-claim is made and asserted for and on behalf of all of the named defendants as set out in sub-paragraphs (e), (f), (g), (h), (i), (j) of Article or Section III of the complaint, and all persons who are represented by the said named persons, associations, and labor unions who are or have been employees of Tennessee Coal, Iron & Railroad Company in its iron ore mines in Jefferson County, Alabama, from to-wit: October 24, 1938, to and inclusive of April 30, 1941, and who are or were members of the named local unions affiliated with the American Federation of Labor, and all other employees of the plaintiff who are or were similarly situated, but who are not specifically referred to or made

parties to this suit. All of the said parties defendant and cross-claimants being too numerous to specifically name or enumerate, but who are of the classes or groups herein enumerated and described.

Second. That on and prior to October 24, 1938, and up to and inclusive of April 30, 1941, the said Tennessee Coal, Iron & Railroad Company was engaged in the manufacture and production of iron and steel products and transporting, selling, and handling such products in interstate commerce among the several states, as averred in Section II of the complaint, and that the persons named and referred to in paragraph first of this cross-claim were employees of the defendant in its iron ore mines in Jefferson County, Alabama, during said period of time, and as such employees were engaged in the production of said goods for interstate commerce, and were therefore working subject to the provisions of the Fair Labor Standards Act of 1938 as to hours worked and rates of pay.

Third. That the persons named and referred to in paragraph first of this cross-claim who were and are employees of the said Tennessee Coal, Iron & Railroad Company in its iron ore mines in Jefferson County, Alabama, and all other employees similarly situated, have been since October 24, 1938, up to and inclusive of April 30, 1941, required to report for work and to be checked in as on duty, subject to the orders and directions of their said employer at the collar or portal of which every iron ore mine of plaintiff the said employees worked, at to-wit: 6:00 o'clock A. M. for the morning shift, and at to-wit: 6:00 o'clock P. M. for the evening shift, and that from said respective times said employees were and are under the control and subject to the orders and directions of their said employer, and are and were engaged in the

performance of their work and duties under said orders and directions until they return to the collar or portal of said mine and are checked out at to-wit: 4:00 o'clock P. M. for the morning shift and at to-wit: 4:00 o'clock A. M. for the evening shift, on each of their respective work days, thereby being engaged in the performance of their work and duties as such employees and subject to the orders and directions of their employer, ten hours on each work day, totaling approximately 50 hours for each work week during the whole of said period of time aforesaid, and for which overtime the said employees have not been paid by the plaintiff as provided for under Section 7 (a) of said Fair Labor Standards Act of 1938, and for such overtime the defendants and cross-claimants herein claim time and a half pay for such overtime, more particularly as follows:

6 hours overtime during each work week of each and every employee (defendants herein) during the first year from the effective date of said Fair Labor Standards Act of 1938;

8 hours overtime during each work week of each and every employee (defendants herein) during the second years from said effective date of said Act;

10 hours overtime during each work week of each and every employee (defendants herein) during the third year from said effective date of said Act to April 30, 1941;

together with an equal amount of payment as penalties, and together with a reasonable attorneys' fee for the services of their attorneys in prosecuting said cross-claim to final determination, as provided for under Section 16 (b) of said Fair Labor Standards Act of 1938.

Wherefore, the Defendants Demand:

(a) That the Court order that the plaintiff, the Tennessee Coal, Iron & Railroad Company, a body corporate, be made a party defendant to respond to this cross-claim, as provided for under the rules of this Court.

(b) That the Court order, adjudge and decree that the work day in under-ground metal mining start when the miner reports for duty as required at or near the collar of the mine, and end when he reaches the collar at the end of the shift, and that the work day also include the aggregate of the time spent on the surface in obtaining and returning lamps, carbide and tools, and in checking in and out, and that the work day not include any fixed lunch period of one-half hour or more during which the miner is relieved of all duties.

(c) That plaintiff is indebted to its under-ground mine employees (defendants herein) for overtime worked by them under the provisions of the Fair Labor Standards Act of 1938.

(d) That, if the Court shall determine that the plaintiff is indebted to its said employees in its iron ore mines in any sums of money for overtime work performed by said employees, as provided for under Section 7 of the Fair Labor Standards Act of 1938, the Court will appoint a Special Master to ascertain and find

1. The name, address, and number of hours worked by each of said employees who would be entitled to relief as a cross-claimant in excess of the numbers of hours fixed under Section 7 of said Act for each work week from to-wit: October 24, 1938, to and inclusive of April 30, 1941, and the amount of each and every such claim for such overtime pay.

(e) That the Court will render judgment in favor of defendants (cross-claimants) and against the plaintiff, Tennessee Coal, Iron & Railroad Company, a corporation, for such overtime pay, assessing and including penalties and attorneys' fees to each of said claims and judgment, as provided for under Section 16 (b) of the Fair Labor Standards Act.

(f) That defendants have such other and further relief as is just.

(g) That the defendants and cross-claimants recover their costs.

J. Q. SMITH,
RALPH W. QUINN,
W. F. SPENCER,
Attorneys for Defendants and cross-claimants herein named.

707-8 Farley Building.

I hereby certify that I have this day served a copy of the above answer on Honorable Borden Burr, Attorney for Petitioners and Plaintiff in said cause.

This the 17th day of May, 1941.

J. Q. SMITH,
Attorney for Defendants.

Filed May 17, 1941.

215 MOTION TO DISMISS AND ANSWER OF DEFENDANTS AFFILIATED WITH INTERNATIONAL UNION OF MINE, MILL AND SMELTER WORKERS.

(Civil Action No. 5232.)

Now comes the defendants, Muscoda Local No. 123, an unincorporated association affiliated with the International Union of Mine, Mill & Smelter Workers, and W. C. Gunnin, Pete Dulaney, R. H. Martin and John Thompson, individually and as officers and members of such Local; and Wenonah Local No. 157, an unincorporated association affiliated with the International Union of Mine, Mill & Smelter Workers, and C. J. McDaniel, W. B. Lemley, R. E. Lemley and Ward Jefferson, individually and as officers and members of such Local; and Ishkooda Local No. 153, an unincorporated association affiliated with the International Union of Mine, Mill & Smelter Workers, and E. A. Sisemore, L. H. McBrayer, Elmore Mitchell, and Dennis Hart, individually and as officers and members of such Local; and Van D. Jones, C. L. Pegues, and Frank Allen, individually and as officers of the International Union of Mine, Mill and Smelter Workers, an unincorporated association, and move the Court to dismiss the bill of complaint and for grounds of this motion assign the following, separately and severally:

1. The complaint fails to state a claim against these defendants upon which relief can be granted.

2. It appears upon the face of the complaint that no actual controversy within the meaning of Section 274 (d) of the Judicial Code (U. S. Code, Title 28, Section 400) exists between the plaintiffs and these defendants, and that there is no cause of action for a declaratory judgment.

3. It appears upon the face of the complaint that the defendants are being sued to obtain a declaratory judgment regarding the interpretation and constitutionality of the Fair Labor Standards Act of 1938 and to secure an injunction against the enforcement of said Act, more particularly, relating to the Modified Portal-to-Portal Opinion and Report of the Administrator of said Act, which is Exhibit A to the complaint herein.

4. It appears upon the face of the complaint that the defendants, and each of them, have no power, authority or discretion to make, issue, amend, or modify any regulation or interpretations or opinions and reports under said Act.

5. It appears upon the face of the complaint that if the action had been brought against the Administrator of the said Act, or any of his duly authorized agents, it would be dismissed for failure to state a claim upon which relief could be granted.

6. It appears upon the face of the complaint that the plaintiff is not threatened with or is facing any irreparable damage or injury.

7. It appears upon the face of the complaint that the plaintiff has a complete and adequate remedy at law.

8. The complaint fails to show any case or controversy between the plaintiff and the defendants properly within the jurisdiction of the Court.

II.

Answer of the Defendants.

The defendants, without waiving the motion to dismiss hereinabove set forth, do make answer to the bill of complaint as follows:

1. For answer to the bill of complaint as a whole, defendants say that since this bill if complaint was filed the complainant has voluntarily undertaken to pay its employees on a basis from portal to portal or collar to collar and is voluntarily doing the very thing which it asks the Court to adjudge would be an irreparable hardship upon the complainant.

2. That the bill of complaint shows on its face that it is a mere device contrived to obtain a ruling from this Court against a government official and nullifying his action as such without making him a party to this proceeding. Under established rules of law and prior decisions of this Court, the complainant would not be entitled to such relief in a direct proceeding against the Administrator of the Wage and Hour Division under the Fair Labor Standards Act of 1938. As a result the complainant is seeking to do deviously and by indirection that which it could not do if it made a direct attack against the action of the Administrator in a proceeding to which he was a party. In short, the bill of complaint attempts by collateral attack to do that which the complainant could not do if it made a direct attack.

For detailed and special and particular answer to the bill of complaint the defendants, in answer to section numbered 1 of the bill entitled "Allegations of Jurisdiction", admit the averments of paragraphs a, b, and C, and

as to paragraphs d, e, f, g, h, and i, the defendants deny that the averments of the bill of complaint state facts sufficient to authorize the Court to render a declaratory judgment or to grant injunctive relief.

Answering section 2 of the bill of complaint entitled "The Plaintiff and Its Operations", defendants deny the averments that "these hourly rates have been established on a systematic basis, taking into consideration all factors which make up a proper occupational rate". Defendants further deny the averment "The operations in its coal mines insofar as the questions involved here are related and concerned, is substantially the same as its operations in its ore mines and limestone mine". The defendants further deny the averment that "The employees are not compelled to use the bath-house facilities". and on the contrary, allege that the nature of the work itself makes it obligatory upon the employee to use the bath-house facilities, except as to a very small group of employees who live very close to the portal of the mines and are thereby enabled to change at home. The defendants further deny the averment "It is not obligatory upon the employee to buy his carbide from the plaintiff" and allege that the physical circumstances and surroundings and the conditions of employment imposed by the plaintiff make it obligatory upon the employee to buy his carbide from the plaintiff.

Defendants deny the averment that "The employees are not required to ride on any particular mantrip, but can follow their own wishes in determining which trip they shall ride", and alleges that because of the fact that facilities are not available to lower the men immediately upon their arrival at the portal, all of the men, as a matter of necessity, must arrange their arrival at the portal so that with the facilities furnished by the

complainant they can be transported to the places designated by the plaintiff for them, in time to comply with the schedule of arrival thereat fixed by the complainant.

Defendants deny the averment that "The men complete their work and leave their working places at approximately 3 P. M. or 3 A. M.", and allege that the men do not leave their working places until they reach the portal.

The defendants deny the averment that "The men's time is computed and they are paid on the basis of eight hours work at the working places", and allege that since the bill of complaint was filed in this cause, beginning on, to-wit: May 1, 1941, the complainant computed and is now computing the men's time on the basis of eight hours from portal to portal.

Defendants deny the averment that "The plaintiff has never compensated its underground employees for any portion of their time spent in going to or from or in being transported to and from their actual work places and such employees have at all times understood and agreed that they should not receive any compensation therefor; and since June, 1934, by letters of understanding; and since May, 1937 by written contracts such understanding has been specifically provided for by express agreements between the Company and the defendant Unions. The average maximum wage paid the underground employees is 68 cents and the minimum 54-½ cents per hour.

"The allegations herein set forth as to operations at the present time are substantially and in all respects true as to operations since and prior to 1936." Defendants allege that the plaintiff is now compensating its under-

ground employees for that portion of their time spent in going to or from or in being transported to and from the portal. Defendants allege that employees have never agreed that they should not receive any compensation for such time. On the contrary, defendants allege that the ore mining operations and limestone mining of the plaintiff has been carried on for a long period of years under conditions which enabled the plaintiff to dictate, without regard to the wishes of the employees, the terms and conditions of their employment. The employees in such operations of the plaintiff were not organized and were in no position to engage in collective bargaining with the plaintiff as to the terms and conditions of their employment. In fact, there has been no bona fide collective bargaining in such operations between the employees and plaintiff over any long period of time. There has been no recognition by the plaintiff of any organization to bargain collectively and its employees, in such operation over any long period of time. Even in June, 1934, the plaintiff did not enter into contracts with any representatives of its employees in such operations except wih Unions which were dominated by the plaintiff. In June, 1934 the letter of understanding was a letter written to the then Secretary of Labor of the United States, the plaintiff scorning any independent representative of its employees for the purpose of collective bargaining to such an extent that they would not address a letter of understanding to such employees or their representative.

Defendants allege that the first time the plaintiff ever signed any contract with these defendants was on, to-wit: October 6, 1938, in connection with the settlement of proceedings instituted by these defendants against the plaintiff under the National Labor Relations Act. Defendants call the attention of the Court to the fact that the contract of October 6, 1938 was entered into only eighteen days

before the Wage and Hour Standards of the Fair Labor Standards Act of 1938 became effective. The average maximum wage paid the underground employee was not 68 cents and the minimum was not 54-½ cents per hour because the plaintiff did not take into account the period of, to-wit: two hours each day spent by the employee while in the service of the defendants, in going to and from the portal to the places designated by the plaintiff.

III.

The defendants for answer to Section 3 of the bill of complaint entitled "The Defendants", admit the allegations of paragraphs A, B, C and D and I, and have no knowledge or information except hearsay and remor or reputation as to the facts alleged in paragraphs designated E, F, G, H, and J, and because of lack of such knowledge are unable either to admit or deny the averments thereof. For answer to the averments of paragraph K thereof, these defendants admit that these defendants do fairly represent all employees who are members of Unions affiliated with the International Union of Mine, Mill & Smelter Workers but expressly deny that there is any actual case or controversy within the provisions of the declaratory judgment Act or the principles of equity jurisprudence which entitled the plaintiff to sue these defendants in their representative capacity for any part of the relief prayed in the bill of complaint.

IX.

For answer to that section of the bill of complaint numbered IV and entitled "Statement of Controversy", these defendants deny that at the time of the filing of the bill there was or now is "an actual and bona fide controversy existing between the plaintiff on the one hand

and the defendants herein named on the other hand" of such a nature as would entitle the plaintiff to a declaratory judgment or to any form of injunctive as set up in this section of the bill of complaint were made by the plaintiff and by these defendants. Those assertions do not create a controversy of the kind and character which justify the Court in rendering a declaratory judgment or granting injunctive relief. Those assertions had been made from time to time over a long period of time dating back to 1938 and particularly since the enactment of the Fair Labor Standards Act of 1938. Those assertions were made before the Wage and Hour Administrator under the Fair Labor Standards Act of 1938 and are set up in his opinion and report. The allegations of those assertions has no proper place in the bill of complaint. They constitute an attack on the opinion and report of the Wage and Hour Administrator, although that attack has been abandoned in actuality by compliance therewith on the part of the plaintiff beginning May 1, 1941. The insertion of these allegations becomes a part of a plan to get the Court to inquire into the methods by which the Wage and Hour Administrator arrived at his opinion and report.

As to that part of said section IV of the bill of complaint which reads: "Without a determination of this controversy it is impossible for plaintiff to know and ascertain whether or not it is violating the Act", these defendants say that under accepted rules of law a party is not entitled to have a Court declare whether or not his conduct will violate a law of the United States. The Court does not decide criminal cases in advance of indictment by a Grand Jury. A further complete answer to this claim of the plaintiff is that the plaintiff does not need any advice from the Court. The plaintiff has already decided to comply with the law and the interpre-

tation thereof set forth in the opinion and report of the Wage and Hour Administrator.

V.

As an answer of that section of the bill of complaint numbered V and entitled "The Opinion of the Administrator" these defendants deny the averment that "said opinion is by no means a determining factor in this proceeding". The defendants deny the allegation that "the institution and continuance in effect of the enforcement of said illegal and erroneous opinion of the Administrator subjects the plaintiff to the peril of the heavy penalties of the Act". The defendants deny that the existence at the present time of defense contracts held by the plaintiff containing stipulations requiring the payment of overtime for any hours in excess of forty hours in any one week or eight hours in any one day, in any way subject the plaintiff to the dilemma of being "called upon to either (a) comply (with irreparable loss and damage as hereinabove averred); or (b) undergo by not complying, the peril of having its said contracts declared forfeited and of being subject to the heavy penalties in said contract provided for in case of violation". The defendants allege that the plaintiff has solved the dilemma which it has itself created by complying with the Act and with the stipulations of said defense contracts.

The defendants deny the materiality and relevancy of the remaining averments set forth in said Section of the complaint. Defendants allege that they have no knowledge or information sufficient to form a belief as to the accuracy of the release of the Wage and Hour Division concerning the Cornucopia Coal Mines and defendants deny that the publication of said release was one if not the sole motivating cause of the claims of the

defendants under the Fair Labor Standards Act of 1938. The defendants further deny knowledge or information sufficient to form a belief as to the truth of the releases of the Wage and Hour Division concerning statements by Colonel Fleming relating to the application of the Fair Labor Standards Act of 1938 to the Bituminous Coal Industry. The defendants allege that said averments are immaterial and irrelevant but call the attention of this Court to the fact that in the Bituminous Coal Mining Industry there has been "A long history of bona fide collective bargaining agreement". The defendants refer to their previous allegation set forth in section II supra of this answer showing that there is no similar or comparable long history of bona fide collective bargaining agreements in the operations of the plaintiff's ore and limestone mines. The defendants further deny the materiality or relevancy of the allegations set forth in said section of the complaint relating to the hearings conducted by the Wage and Hour Administrator. These allegations of the bill are an attempt on the part of the plaintiff to have this Court probe into the exercise by the said Administrator of his authority and power under the Fair Labor Standards Act of 1938. Defendants allege that the opinion and report of the Wage and Hour Administrator are not open to such attack in this proceeding.

VI.

Answering section VI of the bill of complaint entitled "Necessity for the Relief of Declaratory Judgment", these defendants, as to sub-section 1 thereof, say that if any necessity ever existed for the relief of a declaratory judgment that necessity has disappeared. The plaintiff has determined upon a course of conduct. That determination became effective on May 1, 1941. On that date the plaintiff began to comply with the opinion and report

of the Wage and Hour Administrator under the Fair Labor Standards Act of 1938. The plaintiff, therefore, has no need to ask the Court for guidance in its future conduct. All the perils which the plaintiff alleges it would suffer by non-compliance have been removed by actual compliance.

As to sub-section 2 of the said section, entitled "Threatened Litigation", the defendants deny that the plaintiff is in immediate peril of threatened litigation. The defendants deny that they have employed attorneys and directed them to proceed in the prompt bringing of legal proceedings. The defendants deny that the plaintiff is threatened with the "immediate institution and prosecution of a multiplicity of suits involving large sums of money, and unless the declaration herein prayed for is granted, the plaintiff will be faced with great, if not irreparable injury". On the contrary, the provisions of the Fair Labor Standards Act of 1938 cover this situation. That Act provides that a class suit may be brought where the representatives fairly represents the class. The plaintiff has alleged in its bill that these defendants do fairly represent a class. We have heretofore admitted that we do fairly represent a class. Why should this Court assume that these defendants would not avail themselves of the benefit afforded by the express provisions of the Fair Labor Standards Act of 1938.

Furthermore, the plaintiff has a complete and adequate remedy at law. If two or more suits should be brought in the Federal Court this Court has full authority under the laws of the United States to consolidate such suits. If two or more suits should be brought in the State Court the laws of Alabama provide that those suits may be consolidated. The averments of the bill show that there are two groups or classes of employees, those affiliated

with the American Federation of Labor constituting one class or group, and those affiliated with the International Union of Mine, Mill and Smelter Workers constituting another class or group. There would, therefore, be only two class suits. Two does not constitute a multiplicity.

These defendants further show unto the Court that the claims of these defendants as to the proper construction of the Fair Labor Standards Act of 1938 are claims of long standing. These defendants began to make them immediately after the Act became effective. More than two years have passed and these defendants have not brought suit. As representatives of a group or class these defendants would exhaust all the possibilities of negotiation and settlement before they would resort to litigation. Why should this Court now determine there is no possibility of negotiation and settlement. The plaintiff alleged that if it complied with the opinion and report of the Wage and Hour Administrator it would suffer irreparable injury. Yet the facts show that the plaintiff has already complied with the opinion and report of the said Administrator.

VII.

Answering that section of the bill numbered VII and entitled "Probability of Great If Not Irreparable Injury", these defendants say as to sub-section 1 thereof that the plaintiff is not faced with the vexation, cost and expense of a multiplicity because the laws governing the procedure of both the State and Federal Courts give the plaintiff complete protection in the event more than one suit is instituted.

Answering sub-section 2 thereof, these defendants say there is no necessity for a prompt remedy for the reason

that no uncertainty as to the future conduct of the plaintiff now exists. The plaintiff is complying. The damages of non-compliance and the need for judicial construction have, therefore, completely disappeared.

Answering sub-section 3 thereof, defendants again call the attention of the Court to the judicial power of consolidation which exists in both State and Federal Courts and to the fact that it is not yet made clear that the possibility of negotiation and settlement have been exhausted.

Answering sub-section 4 thereof, these defendants say that the defense contracts ceased to be a problem to the plaintiff when the plaintiff began compliance with the opinion and report of the Wage and Hour Administrator.

Answering sub-section 5 thereof, defendants say that the averments therein contained are now moot and inapplicable to the existing situation.

Answering sub-section 6 thereof, these defendants inform the Court that there is no necessity of reaching or attempting to reach new collective bargaining contracts with labor organizations. Existing contracts are not abrogated by the opinion and report of the Wage and Hour Administrator. They are merely modified to comply with the law.

Answering sub-section 7 thereof, defendants say that the expense therein set up as a justification for the plaintiff's claim has already been incurred by the plaintiff and could not possibly be avoided by any adjudication of this Court.

Answering sub-section 8 of said section, defendants say that the plaintiff blows both hot and cold. In a former section of the bill he asks for relief on the theory that the questions were the same. In this sub-section the plaintiff asks for relief on the theory that the claims are different. The truth is that the law is general, it governs the situation and the rights of all the claimants are governed by one law. A mere matter of mathematical computation of the amount of each individual claim does not change the nature of the claim. Such calculations can easily be made in one class action. If the defendants do not bring a class action and bring separate action then this plaintiff can procure their consolidation and procure these mathematical computations in one action.

VIII.

Answering section numbered VIII of the bill of complaint entitled "Perils of Decision" these defendants say again as to sub-sections 1 A, B, C, D; 2 A, B and (a), (b), (c), (d), (e), (f), (g), (h), that all these contentions and allegations have already been answered by the conduct of the plaintiff. The things which are therein alleged that the plaintiff could not do and could not suffer, the plaintiff has already assumed and undertaken to do. As to the claim in this sub-section B that compliance with the opinion and report of the Wage and Hour Administrator would result in a loss of production, defendants allege that the time spent at the face does not necessarily measure the quantity of ore produced. On the contrary, experience has demonstrated that a shortening of hours increases the speed of production.

IX.

Answering section IX of the bill of complaint, entitled "Great Weight Should Be Accorded to Any Reasonable

Standards Which Represent the Prevailing Customs and Practices in the Particular Industry and Which Are Supported By a Long History of Bona Fide Collective Bargaining Agreements", these defendants assert that there has not been any long history of bona fide collective bargaining agreement in the operations of the plaintiff's ore mines and limestone mines. The situation has already been described in this answer. The situation was one of employer dictation; complete employer strength and employee weakness, complete employer solidarity, and lack of cohesion on the part of the employee; directions equivalent to commands on the part of the plaintiff and enforced obedience on the part of the helpless employees.

Answering sub-section 4 of said section, these defendants say that the law of the land is supreme. Parties can not escape the provisions of a law by entering into a contract. The Congress of the United States has established the rule of action. That rule applies to all men at all times and everywhere. If because of weakness and the necessities of their situation, employees have entered into contracts whereby they agreed to work for less or to work longer than the Fair Labor Standards Act of 1938 prescribes, then those provisions of the contracts violating the Act becomes absolutely void and of no effect. A company cannot obtain the right to violate a law by any theory of individual estoppel.

X.

Answering that section of the bill of complaint entitled "Contractural Obligations" and numbered X, these defendants deny the negotiations and execution of written contracts on or about the 31st day of May, 1937 and call the attention of the Court to the fact that plaintiff attached as Exhibit C a contract made and entered

into on October 6, 1938. As to that part of said section which claims that the Unions, with full knowledge of the enactment of the Act and with knowledge and understanding that in consideration of benefits given them under said contracts, they were waiving and surrendering the contentions they are now making, these defendants say that no individual has the right by private agreement to nullify an Act of Congress. The Fair Labor Standards Act of 1938 was enacted to protect the employee. This protection is afforded whether the employee has to submit to being overreached because of his necessities, or whether he ignorantly enters into a contract with provisions contrary to the law. Defendants deny that any person can be bound by the terms of a contract in such fashion as to nullify an Act of Congress. These defendants further deny that there is or can be an estoppel to violate the law. If private contracts can be substituted for Congressional enactments, the Congress of the United States is engaging in a vain and foolish pursuit in passing laws.

XI.

Answering that section of the bill of complaint numbered XI and entitled "Petition and Prayer" these defendants deny that the plaintiff is entitled to any part of the relief prayed in the bill of complaint.

Wherefore, the premises considered, these defendants pray that this Court on the hearing hereof will dissolve the temporary injunction heretofore issued and will dismiss the bill of complaint at the cost of the plaintiff.

LEE PRESSMAN,
CRAMPTON HARRIS,
JOSEPH KOVNER,
J. A. LIPSCOMB,
By E. C. H.,
Attorneys for Defendants named
in the first paragraph hereof.

Note: I hereby certify that I have served a copy of the foregoing motion to dismiss and answer upon Honorable Borden Burr, Solicitor of Record for the Plaintiff. This 17th day of May, 1941.

CRAMPTON HARRIS.

Filed May 17, 1941.

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MOTION TO DISMISS AND ANSWER OF DEFENDANTS AFFILIATED WITH INTERNATIONAL UNION OF MINE, MILL AND SMELTER WORKERS.

231 (Civil Action No. 5233.)

Now come the defendants and move the Court to dismiss the bill of complaint, and for grounds of this motion, assign the following separately and severally:

1. The complaint fails to state a claim against these defendants upon which relief can be granted.

2. It appears upon the face of the complaint that no actual controversy within the meaning of Section 274 (d) of the Judicial Code (U. S. Code, Title 28, Section 400) exists between the plaintiffs and these defendants, and that there is no cause of action for a declaratory judgment.

3. It appears upon the face of the complaint that the defendants are being sued to obtain a declaratory judgment regarding the interpretation and constitutionality of the Fair Labor Standards Act of 1938 and to secure an injunction against the enforcement of said Act, more par-

ticularly, relating to the Modified Portal-to-Portal Opinion and Report of the Administrator of said Act, which is Exhibit A to the complaint herein.

4. It appears upon the face of the complaint that the defendants, and each of them, have no power, authority or discretion to make, issue, amend, or modify any regulation or interpretations or opinions and reports under said Act.

5. It appears upon the fact of the complaint that if the action had been brought against the Administrator of the said Act, or any of his duly authorized agents, it would be dismissed for failure to state a claim upon which relief could be granted.

6. It appears upon the face of the complaint that the plaintiff is not threatened with or is facing any irreparable damage or injury.

7. It appears upon the face of the complaint that the plaintiff has a complete and adequate remedy at law.

8. The complaint fails to show any case or controversy between the plaintiff and the defendants properly within the jurisdiction of the Court.

I.

Answer of the Defendants.

The defendants, without waiving the motion to dismiss hereinabove set forth, do make answer to the bill of complaint as follows:

1. For answer to the bill of complaint as a whole, defendants say that since this bill of complaint was filed

the complainant has voluntarily undertaken to pay its employees on a basis from portal to portal or collar to collar and is voluntarily doing the very thing which it asks the Court to adjudge would be an irreparable hardship upon the complainant.

2. That the bill of complaint shows on its face that it is a mere device contrived to obtain a ruling from this Court against a government official and nullifying his action as such without making him a party to this proceeding. Under established rules of law and prior decisions of this Court, the complainant would not be entitled to such relief in a direct proceeding against the Administrator of the Wage and Hour Division under the Fair Labor Standards Act of 1938. As a result the complainant is seeking to do deviously and by indirection that which it could not do if it made a direct attack against the action of the Administrator in a proceeding to which he was a party. In short, the bill of complaint attempts by collateral attack to do that which the complainant could not do if it made a direct attack.

For detailed and special and particular answer to the bill of complaint the defendants, in answer to section numbered 1 of the bill entitled "Allegations of Jurisdiction", admit the averments of paragraphs (a), (b), and (c), and as to paragraphs (d), (e), (f), (g), (h), and (i), the defendants deny that the averments of the bill of complaint state facts sufficient to authorize the Court to render a declaratory judgment or to grant injunctive relief.

II.

Answering section II of the bill of complaint entitled "The Plaintiff and Its Operations", the defendants deny

the averments that "these hourly rates have been established systematically through collective bargaining with the defendants, taking into consideration all factors which make up a proper occupational rate". Defendants further deny the averment "The operations in its coal mines insofar as the questions involved here are related and concerned, is substantially the same as its operations in its ore mines". The defendants further deny the averment that "The use of the change or bathhouse is optional", and on the contrary, allege that the nature of the work itself makes it obligatory upon the employees to use the bath-house facilities, except as to a very small group of employees who live very close to the portal of the mines and are thereby enabled to change at home. The defendants further deny the averment "It is not obligatory upon the employees to buy the carbide from the plaintiff" and allege that the physical circumstances and surroundings and the conditions of employment imposed by the plaintiff make it obligatory upon the employee to buy his carbide from the plaintiff.

Defendants deny the averment that "The employees are not required to ride on any particular mantrip, but can follow their own wishes in determining which trip they shall ride," and allege that because of the fact that facilities are not available to lower the men immediately upon their arrival at the portal, all of the men, as a matter of necessity, must arrange their arrival at the portal so that with the facilities furnished by the complainant they can be transported to the places designated by the plaintiff for them, in time to comply with the schedule of arrival thereat fixed by the complainant.

The defendants deny the averment that "The men's time is computed and they are paid on the basis of eight hours work at the working places", and allege that since

the bill of complaint was filed in this cause, beginning on, to-wit: May 1, 1941, the complainant computed and is now computing the men's time on the basis of eight hours from portal to portal.

Defendants deny the averment that "The plaintiff has never compensated its underground employees for any portion of their time spent in going to or from or in being transported to and from their actual work places and such employees have at all times understood and agreed that they should not receive any compensation therefor."

"The allegations herein set forth as to operations at the present time are substantially and in all respects true as to operations since and prior to 1933." Defendants allege that the plaintiff is now compensating its underground employees for that portion of their time spent in going to or from or in being transported to and from the portal. Defendants allege that employees have never agreed that they should not receive any compensation for such time. On the contrary, defendants allege that the ore mining operations of the plaintiff have been carried on for a long period of years under conditions which enabled the plaintiff to dictate, without regard to the wishes of the employees, the terms and conditions of their employment. The employees in such operations of the plaintiff were not organized and were in no position to engage in collective bargaining with the plaintiff as to the terms and conditions of their employment. In fact, there has been no bona fide collective bargaining in such operations between the employees and the plaintiff over any long period of time. There has been no recognition by the plaintiff of any organization to bargain collectively for its employees, in such operation over any long period of time.

Defendants allege that even in the year 1934 the plaintiff did not enter into contracts with the defendants as

representatives of the defendant unions herein named or with any independent unions, but on the contrary made private agreements with individual employees. In short, there was no agreement as a result of collective bargaining whatsoever between the plaintiff and its employees during the year 1934.

III.

The defendants for answer to Section 3 of the bill of complaint entitled "The Defendants" admit the allegations of paragraphs (a), (b), (c) and (d). For answer to the averments of paragraph (e) thereof, these defendants admit that these defendants do fairly represent all employees who are members of Unions affiliated with the International Union of Mine, Mill & Smelter Workers but expressly deny that there is any actual case or controversy within the provisions of the declaratory judgment Act or the principles of equity jurisprudence which entitled the plaintiff to sue these defendants in their representative capacity for any part of the relief prayed in the bill of complaint.

IV.

For answer to that section of the bill of complaint numbered IV and entitled "Statement of Controversy", these defendants deny that at the time of the filing of the bill there was or now is "an actual and bona fide" controversy existing between the plaintiff on the one hand and the defendants herein named on the other hand" of such a nature as would entitle the plaintiff to a declaratory judgment or to any form of injunctive relief. These defendants admit that assertions substantially as set up in this section of the bill of complaint were made by the plaintiff and by these defendants. Those assertions do

not create a controversy of the kind and character which justify the Court in rendering a declaratory judgment or granting injunctive relief. Those assertions had been made from time to time over a long period of time dating back to 1938 and particularly since the enactment of the Fair Labor Standards Act of 1938. Those assertions were made before the Wage and Hour Administrator under the Fair Labor Standards Act of 1938 and are set up in his opinion and report. The allegations of those assertions has no proper place in the bill of complaint. They constitute an attack on the opinion and report of the Wage and Hour Administrator, although that attack has been abandoned in actuality by compliance therewith on the part of the plaintiff beginning May 1, 1941. The insertion of these allegations becomes a part of a plan to get the Court to inquire into the methods by which the Wage and Hour Administrator arrived at his opinion and report.

As to that part of said section IV of the bill of complaint which reads: "Without a determination of this controversy it is impossible for plaintiff to know and ascertain whether or not it is violating the act", these defendants say that under accepted rules of law a party is not entitled to have a Court declare whether or not his conduct will violate a law of the United States. The Court does not decide criminal cases in advance of indictment by a Grand Jury. A further complete answer to this claim of the plaintiff is that the plaintiff does not need any advice from the Court. The plaintiff has already decided to comply with the law and the interpretation thereof set forth in the opinion and report of the Wage and Hour Administrator.

V.

As an answer to that section of the bill of complaint numbered V and entitled "The Opinion of the Adminis-

trator" these defendants deny the averment that "said opinion is by no means a determining factor in this proceeding". The defendants deny the allegation that "the institution and continuance in effect of the enforcement of said illegal and erroneous opinion of the Administrator subjects the plaintiff to the peril of the heavy penalties of the Act".

The defendants deny the materiality and relevancy of the remaining averments set forth in said Section of the complaint. Defendants allege that they have no knowledge or information sufficient to form a belief as to the accuracy of the release of the Wage and Hour Division concerning the Cornucopia Gold Mines and defendants deny that the publication of said release was one of if not the sole motivating cause of the claims of the defendants under the Fair Labor Standards Act of 1938. The defendants further deny knowledge or information sufficient to form a belief as to the truth of the releases of the Wage and Hour Division concerning statements by Colonel Fleming relating to the application of the Fair Labor Standards Act of 1938 to the Bituminous Coal Industry. The defendants allege that said averments are immaterial and irrelevant but call the attention of this Court to the fact that in the Bituminous Coal Mining Industry there has been "a long history of bona fide collective bargaining agreements". The defendants refer to their previous allegation set forth in Section II supra of this answer showing that there is no similar or comparable long history of bona fide collective bargaining agreements in the operations of the plaintiff's ore mines. The defendants further deny the materiality or relevancy of the allegations set forth in said section of the complaint relating to the hearings conducted by the Wage and Hour Administrator. These allegations of the bill are an attempt on the part of the plaintiff to have this Court

probe into the exercise by the said Administrator of his authority and power under the Fair Labor Standards Act of 1938. Defendants allege that the opinion and report of the Wage and Hour Administrator are not open to such attack in this proceeding.

VI.

Answering section VI. of the bill of complaint entitled "Necessity for the Relief of Declaratory Judgment", these defendants, as to sub-section 1 thereof, say that if any necessity ever existed for the relief of a declaratory judgment that necessity has disappeared. The plaintiff has determined upon a course of conduct. That determination became effective on May 1, 1941. On that date the plaintiff began to comply with the opinion and report of the Wage and Hour Administrator under the Fair Labor Standards Act of 1938. The plaintiff, therefore, has no need to ask the Court for guidance in its future conduct. All the perils which the plaintiff alleges it would suffer by non-compliance have been removed by actual compliance.

As to sub-section 2 of said section, entitled "Threatened Litigation", the defendants deny that the plaintiff is in immediate peril of threatened litigation. The defendants deny that they have employed attorneys and directed them to proceed in the prompt bringing of legal proceedings. The defendants deny that the plaintiff is threatend with the "immediate institution and prosecution of a multiplicity of suits involving large sums of money, and unless the declaration herein prayed for is granted, the plaintiff will be faced with great, if not irreparable injury". On the contrary, the provisions of the Fair Labor Standards Act of 1938 cover this situation. That Act provides that a class suit may be brought where the

representative fairly represents the class. The plaintiff has alleged in its bill that these defendants so fairly represent a class. We have heretofore admitted that we do fairly represent a class. Why should this Court assume that these defendants would not avail themselves of the benefit afforded by the express provisions of the Fair Labor Standards Act of 1938.

Furthermore, the plaintiff has a complete and adequate remedy at law. If two or more suits should be brought in the Federal Court this Court has full authority under the laws of the United States to consolidate such suits. If two or more suits should be brought in the State Court the laws of Alabama provide that those suits may be consolidated. The averments of the bill show that there is only one group of employees, namely, those affiliated with the International Union of Mine, Mill and Smelter Workers. There would, therefore, be only one class suit. One suit does not constitute a multiplicity.

These defendants further show unto the Court that the claims of these defendants as to the proper construction of the Fair Labor Standards Act of 1938 are claims of long standing. These defendants began to make them immediately after the Act became effective. More than two years have passed and these defendants have not brought suit. As representatives of a group of class these defendants would exhaust all the possibilities of negotiation and settlement before they would resort to litigation. Why should this Court now determine there is no possibility of negotiation and settlement. The plaintiff alleged that if it complied with the opinion and report of the Wage and Hour Administrator it would suffer irreparable injury. Yet the facts show that the plaintiff has already complied with the opinion and report of the said Administrator.

VII.

Answering that section of the bill numbered VII and entitled "Probability of Great If Not Irreparable Injury", these defendants say as to sub-section 1 thereof that the plaintiff is not faced with the vexation, cost and expense of a multiplicity because the laws governing the procedure of both the State and Federal Courts give the plaintiff complete protection in the event more than one suit is instituted.

Answering sub-section 2 thereof, these defendants say there is no necessity for a prompt remedy for the reason that no uncertainty as to the future conduct of the plaintiff now exists. The plaintiff is complying. The damages of non-compliance and the need for judicial construction have, therefore, completely disappeared.

Answering sub-section 3 thereof, defendants again call the attention of the Court to the judicial power of consolidation which exists in both State and Federal Courts and to the fact that it is not yet made clear that the possibility of negotiation and settlement has been exhausted.

Answering sub-section 4 of said section, defendants say that the plaintiff blows both hot and cold. In a former section of the bill he asks for relief on the theory that the questions were the same. In this sub-section the plaintiff asks for relief on the theory that the claims are different. The truth is that the law is general, it governs the situation and the rights of all the claimants are governed by one law. A mere matter of mathematical computation of the amount of each individual claim does not change the nature of the claim. Such calculations can easily be made in one class action. If the defendants do

not bring a class action and bring separate action then this plaintiff can procure their consolidation and procure these mathematical computations in one action.

Answering sub-section 5 thereof, defendants say that the averments therein contained are now moot and inapplicable to the existing situation.

Answering sub-section 6 thereof, these defendants inform the Court that there is no necessity of reaching or attempting to reach new collective bargaining contracts with labor organizations. Existing contracts are not abrogated by the opinion and report of the Wage and Hour Administrator. They are merely modified to comply with the law.

Answering sub-section 7 thereof, defendants say that the expense therein set up as a justification for the plaintiff's claim has already been incurred by the plaintiff and could not possibly be avoided by any adjudication of this Court.

VIII.

Answering section numbered VIII of the bill of complaint entitled "Perils of Decision" these defendants say again as to sub-sections 1 A, B, C; 2 A, B and (a), (b), (c), (d), (e), (f), (g), (h), (i), and (j) that all these contentions and allegations have already been answered by the conduct of the plaintiff. The things which are therein alleged that the plaintiff could not do and could not suffer, the plaintiff has already assumed and undertaken to do. As to the claim in this sub-section B that compliance with the opinion and report of the Wage and Hour Administrator would result in a loss of production, defendants allege that the time spent at the face does

not necessarily measure the quantity of ore produced. On the contrary, experience has demonstrated that a shortening of hours increases the speed of production.

IX.

Answering section IX of the bill of complaint, entitled "Great Weight Should Be Accorded to Any Reasonable Standards Which Represent the Prevailing Customs and Practices in the Particular Industry and Which Are Supported By a Long History of Bona Fide Collective Bargaining Agreements", these defendants assert that there has not been any long history of bona fide collective bargaining agreements in the operations of the plaintiff's ore mines. The situation has already been described in this answer. That situation was one of employer dictation; complete employer strength and employee weakness, complete employer solidarity, and lack of cohesion on the part of the employee; directions equivalent to commands on the part of the plaintiff and enforced obedience on the part of the helpless employees.

Answering sub-section 4 of said section, these defendants say that the law of the land is supreme. Parties can not escape the provisions of a law by entering into a contract. The Congress of the United States has established the rule of action. That rule applies to all men at all times and everywhere. If because of weakness and the necessities of their situation, employees have entered into contracts whereby they agreed to work for less or to work longer than the Fair Labor Standards Act of 1938 prescribes, then those provisions of the contracts violating the Act become absolutely void and of no effect. A company cannot obtain the right to violate a law by any theory of individual estoppel.

X.

Answering the section of the bill of complaint entitled "Contractual Obligations" and numbered X, these defendants assert that the contract attached as Exhibit B to the complaint contains in Section IX, sub-paragraph (b) thereof, this provision: "This contract shall not conflict with any present State or Fedral law or laws that may be enacted during the life of such agreement."

For further particular answer to that part of said section which claims that the Unions, with full knowledge of the enactment of the Act and with knowledge and understanding that in consideration of benefits given them under said contracts and are bound thereby, these defendants say that no individual has the right by private agreement to nullify an Act of Congress. The Fair Labor Standards Act of 1938 was enacted to protect the employees. This protection is afforded whether the employee has to submit to being overreached because of his necessities, or whether he ignorantly enters into a contract with provisions contrary to the law. Defendants deny that any person can be bound by the terms of a contract in such fashion as to nullify an Act of Congress. These defendants further deny that there is or can be an estoppel to violate the law. If private contracts can be substituted for Congressional enactments, the Congress of the United States is engaging in a vain and foolish pursuit in passing laws.

XI.

Answering that section of the bill of complaint numbered XI and entitled "Petition and Prayer" these defendants deny that the plaintiff is entitled to any part of the relief prayed in the bill of complaint.

Wherefore, the premises considered, these defendants pray that this Court on the hearing hereof will dissolve the temporary injunction heretofore issued and will dismiss the bill of complaint at the cost of the plaintiff.

LEE PRESSMAN,
CRAMPTON HARRIS,
JOSEPH KOVNER,
J. A. LIPSCOMB,
By E. C. H.,
Attorneys for Defendants.

Note: I hereby certify that I have served a copy of the foregoing motion to dismiss and answer upon Honorable E. L. All, Solicitor of Record for the Plaintiff.

This 17th day of May, 1941.

CRAMPTON HARRIS.

Filed May 17, 1941.

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245 MOTION TO DISMISS AND ANSWER OF DEFENDANTS AFFILIATED WITH INTERNATIONAL UNION OF MINE, MILL, AND SMELTER WORKERS.

(Civil Action No. 5234.)

Now come the defendants, Raimund Local 121, an unincorporated association affiliated with the International Union of Mine, Mill & Smelter Workers, and John Butler, Lewis Tarrant and B. G. Stephens, individually and as officers and members of such Local, and Van D. Jones, C. L. Pegues, and Frank Allen, individually and as officers of the International Union of Mine, Mill & Smelter

Workers, an unincorporated association, and move the Court to dismiss the bill of complaint, and for grounds of this motion assign the following, separately and severally:

1. The complaint fails to state a claim against these defendants upon which relief can be granted.

2. It appears upon the face of the complaint that no actual controversy within the meaning of Section 274 (d) of the Judicial Code (U. S. Code, Title 28, Section 400) exists between the plaintiff and these defendants, and that there is no cause of action for a declaratory judgment.

3. It appears upon the face of the complaint that the defendants are being sued to obtain a declaratory judgment regarding the interpretation and constitutionality of the Fair Labor Standards Act of 1938 and to secure an injunction against the enforcement of said Act, more particularly, relating to the Modified Portal-to-Portal Opinion and Report of the Administrator of said Act, which is Exhibit A to the complaint herein.

4. It appears upon the face of the complaint that the defendants, and each of them, have no power, authority or discretion to make, issue, amend, or modify any regulation or interpretations or opinions and reports under said Act.

5. It appears upon the face of the complaint that if the action had been brought against the Administrator of said Act, or any of his duly authorized agents, it would be dismissed for failure to state a claim upon which relief could be granted.

6. It appears upon the face of the complaint that the plaintiff is not threatened with and is not facing any irreparable damage or injury.

7. It appears upon the face of the complaint that the plaintiff has a complete and adequate remedy at law.

8. The complaint fails to show any case or controversy between the plaintiff and the defendants properly within the jurisdiction of the Court.

## ANSWER OF THE DEFENDANTS.

### I.

The defendants, without waiving the motion to dismiss hereinabove set forth, do make answer to the bill of complaint as follows:

1. For answer to the bill of complaint as a whole, defendants say that since this bill of complaint was filed the complainant has voluntarily undertaken to pay its employees on a basis from portal to portal or collar to collar and is voluntarily doing the very thing which it asks the Court to adjudge would be an irreparable hardship upon the complainant.

2. That the bill of complaint shows on its face that it is a mere device contrived to obtain a ruling from this Court against a government official and nullifying his action as such without making him a party to this proceeding. Under established rules of law and prior decisions of this Court, the complainant would not be entitled to such relief in a direct proceeding against the Administrator of the Wage and Hour Division under the Fair Standards Act of 1938. As a result the complainant is seek-

ing to do deviously and by indirection that which it could not do if it made a direct attack against the action of the Administrator in a proceeding to which he was a party. In short, the bill of complaint attempts by collateral attack to do that which the complainant could not do if it made a direct attack.

For detailed and special and particular answer to the bill of complaint, the defendants, in answer to section numbered 1 of the bill entitled "Allegations of Jurisdiction," admit the averments of paragraphs (a), (b), and (c), and as to paragraphs (d), (e), (f), (g) and (h), the defendants deny that the averments of the bill of complaint state facts sufficient to authorize the Court to render a declaratory judgment or to grant injunctive relief.

II.

Answering Section II of the bill of complaint entitled "The Plaintiff and Its Operations," defendants deny the averments that "The operations in its coal mines insofar as the questions involved here are related and concerned, are the same operations as the operations in its ore mines." The defendants further deny the averment that "The employees are not compelled to use the bath-house facilities" and on the contrary, allege that the nature of the work itself makes it obligatory upon the employees to use the bath-house facilities, except as to a very small group of employees who live very close to the portal of the mines and are thereby enabled to change at home.

Defendants deny the averment that "The employees are not required to ride on any particular mantrip, but can follow their own wishes in determining which trip they shall ride," and allege that because of the fact that facilities are not available to lower the men immediately upon

their arrival at the portal, all of the men, as a matter of necessity, must arrange their arrival at the portal so that with the facilities furnished by the complainant they can be transported to the places designated by the plaintiff for them, in time to comply with the schedule of arrival thereat fixed by the complainant.

Defendants deny the averment that "The plaintiff has never compensated its underground employees for any portion of their time spent in going to or from or in being transported to and from their work places and such employees have at all times understood and agreed that they should not receive any compensation therefor; and such understanding and agreement has been specifically provided for by agreements, express or implied, between the company and its underground employees."

"The allegations herein set forth as to operations at the present time are substantially and in all repsect true as to operations for several years prior to the enactment of the Act." Defendants allege that the plaintiff is now compensating its underground employees for that portion of their time spent in going to or from or in being transported to and from the portal. Defendants allege that employees have never agreed that they should not receive any compensation for such time. On the contrary, defendants allege that the ore mining operations of the plaintiff have been carried on for a long period of years under conditions which enabled the plaintiff to dictate, without regard to the wishes of the employees, the terms and conditions of their employment. The employees in such operations of the plaintiff were not organized and were in no position to engage in collective bargaining with the plaintiff as to the terms and conditions of their employment. In fact, there has been no bona fide collective bargaining in such operations between the employees and the plaintiff at all. At no time, either, prior to the enactment of the Fair

Labor Standards Act of 1938 or since, has the plaintiff submitted the terms and conditions of employment at its mines to the processes of voluntary and bona fide collective bargainmg.

III.

The defendants for answer to Section III of the bill of complaint entitled "The Defendants," admit the allegations of paragraphs (a) and (b), and have no knowledge or information except hearsay and rumor or reputation as to the facts alleged in paragraphs designated (c) and (d), and because of lack of such knowledge are unable either to admit or deny the averments thereof. For answer to the averments of paragraph (e) thereof, these defendants admit that these defendants do fairly represent all employees who are members of Unions affiliated with the International Union of Mine, Mill & Smelter Workers but expressly deny that there is any actual case or controversy within the provisions of the declaratory judgment act or the principles of equity jurisprudence which which entitled the plaintiff to sue these defendants in their representative capacity for any part of the relief prayed in the bill of complaint.

IV.

For answer to that section of the bill of complaint numbered IV and entitled "Statement of Controversy," these defendants deny that at the time of the filing of the bill there was or now is "an actual and bona fide controversy existing between the plaintiff on the one hand and the defendants herein named on the other hand" of such a nature as would entitle the plaintiff to a declaratory judgment or to any form of injunctive relief. These defendants admit that assertions substantially as set up in this section of the bill of complaint were made by the plaintiff

and by these defendants. Those assertions do not create a controversy of the kind and character which justify the Court in rendering a declaratory judgment or granting injunctive relief. Those assertions had been made from time to time over a long period of time dating back to 1938 and particularly since the enactment of the Fair Labor Standards Act of 1938. Those assertions were made before the Wage and Hour Administrator under the Fair Labor Standards Act of 1938 and are set up in his opinion and report. The allegation of those assertions has no proper place in the bill of complaint. They constitute an attack on the opinion and report of the Wage and Hour Administrator, although that attack has been abandoned in actuality by compliance therewith on the part of the plaintiff beginning May 1, 1941. The insertion of these allegations becomes a part of a plan to get the Court to inquire into the methods by which the Wage and Hour Administrator arrived at his opinion and report.

As to that part of said Section IV of the bill of complaint which reads, "Without a determination of this controversy it is impossible for plaintiff to know and ascertain whether or not it is violating the act," these defendants say that under accepted rules of law a party is not entitled to have a Court declare whether or not his conduct will violate a law of the United States. The Court does not decide criminal cases in advance of indictment by a Grand Jury. A further complete answer to this claim of the plaintiff is that the plaintiff does not need any advice from the Court. The plaintiff has already decided to comply with the law and the interpretation thereof set forth in the opinion and report of the Wage and Hour Administrator.

V.

As an answer of that section of the bill of complaint numbered V and entitled "The Opinion of the Adminis-

trator" these defendants deny the averment that "Said opinion is by no means a determining factor in this proceeding." The defendants deny the allegations that "the institution and continuance in effect of the enforcement or threatened enforcement of said illegal and erroneous opinion of the Administrator subjects the plaintiff to the peril of the heavy penalities of the Act."

The defendants deny the materiality and relevancy of the remaining averment set forth in said section of the complaint. Defendants allege that they have no knowledge of information sufficient to form a belief as to the accuracy of the release of the Wage and Hour Division concerning the Cornucopia Gold Mines and defendants deny that the publication of said release was one of if not the sole motivating cause of the claims of the defendants under the Fair Labor Standards Act of 1938. The defendants further deny knowledge or information sufficient to form a belief as to the truth of the releases of the Wage and Hour Division concerning statements by Colonel Fleming relating to the application of the Fair Labor Standards Act of 1938 to the Bituminous Coal Industry. The defendants allege that said averments are immaterial and irrelevant but call the attention of this Court to the fact that in the Bituminous Coal Mining Industry there has been "a long history of bona fide collective bargaining agreements." The defendants refer to their previous allegations set forth in Section II supra of this answer showing that there is no similar or comparable long history of bona fide collective bargaining agreements in the operations of the plaintiff's ore mines. The defendants further deny the materiality or relevancy of the allegations set forth in said section of the complaint relating to the hearings conducted by the Wage and Hour Administrator. These allegations of the bill are an attempt on the part of the plaintiff to have this Court probe into the exercise by the said Administrator of his authority and power un-

der the Fair Labor Standards Act of 1938. Defendants allege that the opinion and report of the Wage and Hour Administrator are not open to such attack in this proceeding.

VI.

Answering section VI of the bill of complaint entitled "Necessity For The Relief of Declaratory Judgement", these defendants, as to sub-section 1 thereof, say that if any necessity ever existed for the relief of a declaratory judgment that necessity has disappeared. The plaintiff has determined upon a course of conduct. That determination became effective on May 1, 1941. On that date the plaintiff began to comply with the opinion and report of the Wage and Hour Administrator under the Fair Labor Standards Act of 1938. The plaintiff, therefore, has no need to ask the Court for guidance in its future conduct. All the perils which the plaintiff alleges it would suffer by non-compliance have been removed by actual compliance.

As to sub-section 2 of the said section, entitled "Threatened Litigation", the defendants deny that the plaintiff is in immediate peril of threatened litigation. The defendants deny that they have employed attorneys and directed them to proceed in the prompt bringing of legal proceedings. The defendants deny that the plaintiff is threatened with the "immediate institution and prosecution of a multiplicity of suits involving large sums of money, and unless the declaration herein prayed for is granted, the plaintiff will be faced with great, if not irreparable injury". On the contrary, the provisions of the Fair Labor Standards Act of 1938 cover this situation. That Act provides that a class suit may be brought where the representative fairly represents the class. The plaintiff has alleged in its bill that these defendants do fairly represent a class. We have heretofore admitted that we do fairly

represent a class. Why should this Court assume these defendants would not avail themselves of the benefit afforded by the express provisions of the Fair Labor Standards Act of 1938.

Furthermore, the plaintiff has a complete and adequate remedy at law. If two or more suits should be brought in the Federal Court, this Court has full authority under the laws of the United States to consolidate such suits. If two or more suits should be brought in the State Court the laws of Alabama provide that those suits may be consolidated. The averments of the bill show that there are two groups or classes of employees, those affiliated with the International Union of Mine, Mill and Smelter Workers constituting one class or group, and the group known as Unit Number 8 Brotherhood of Miners of Captive Ore Mines of Alabama, of whose affiliations these defendants have never been exactly informed. There would, therefore, be only two class suits. Two does not constitute a multiplicity.

These defendants further show unto the Court that the claims of these defendants as to the proper construction of the Fair Labor Standards Act of 1938 are claims of long standing. These defendants began to make them immediately after the Act became effective. More than two years have passed and these defendants have not brought suit. As representatives of a group or class these defendants would exhaust all the possibilities of negotiations and settlement before they would resort to litigation. Why should this Court now determine there is no possibility or negotiation and settlement. The plaintiff alleged that if it complied with the opinion and report of the Wage and Hour Administrator it would suffer irreparable injury. Yet the facts show that the plaintiff has already complied with the opinion and report of the said Administrator.

VII.

Answering that section of the bill numbered VII and entitled "Probability of Great If Not Irreparable Injury", these defendants say as to sub-section 1 thereof that the plaintiff is not faced with the vexation, cost and expense of a multiplicity because the laws governing the procedure of both State and Federal Courts give the plaintiff complete protection in the event more than one suit is instituted.

Answering sub-section 2 thereof, these defendants say there is no necessity for a prompt remedy for the reason that no uncertainty as to the future conduct of the plaintiff now exists. The plaintiff is complying. The damages of non-compliance and the need for judicial construction have, therefore, completely disappeared.

Answering sub-section 3 thereof, defendants again call the attention of the Court to the judicial power of consolidation which exists in both State and Federal Courts and to the fact that it is not yet made clear that the possibility of negotiation and settlement has been exhausted.

Answering sub-section 4 thereof, defendants say that the averments therein contained are now moot and inapplicable to the existing situation.

Answering sub-section 5 thereof, defendants say that the expense therein set up as a justification for the plaintiff's claim has already been incurred by the plaintiff and could not possibly be avoided by any adjudication of this Court.

Answering sub-section 6 of said section, defendants say that the plaintiff blows both hot and cold. In a former

section of the bill he asks for relief on the theory that the questions were the same. In this sub-section the plaintiff asks for relief on the theory that the claims are different. The truth is that the law is general, it governs the situation and the rights of all the claimants are governed by one law. A mere matter of mathematical computation of the amount of each individual claim does not change the nature of the claim. Such calculations can easily be made in one class action. If the defendants do not bring a class action and bring separate action then this plaintiff can procure their consolidation and procure these mathematical computations in one action.

VIII.

Answering section numbered VIII of the bill of complaint entitled "Perils of Decision" these defendants say again as to sub-sections 1 A, B, C; 2 A, B, and (a), (b), (c), (d); (1), (2), (3), (e), (f), that all these contentions and allegations have already been answered by the conduct of the plaintiff. The things which are therein alleged that the plaintiff could not do and could not suffer, the plaintiff has already assumed and undertaken to do. As to the claim in this sub-section B that compliance with the opinion and report of the Wage and Hour Administrator would result in a loss of production, defendants allege that the time spent at the face does not necessarily measure the quantity of ore produced. On the contrary, experience has demonstrated that a shortening of hours increases the speed of production.

IX.

Answering section IX of the bill of complaint, entitled "Great Weight Should Be Accorded to Any Reasonable Standards Which Represent the Prevailing Customs and Practices in the Particular Industry and Which Are Sup-

ported By a Long History of Bona Fide Collective Bargaining Agreements". these defendants assert that there has not been any history, long or short, of bona fide collective bargaining agreements in the operations of the plaintiff's ore mines. The situation has already been described in this answer. That situation was one of employer dictation; complete employer strength and employee weakness, complete employer solidarity, and lack of cohesion on the part of the employee; directions equivalent to commands on the part of the plaintiff and enforced obedience on the part of the helpless employees.

X.

Answering that section of the bill of complaint numbered X and entitled "Petition and Prayer" these defendants deny that the plaintiff is entitled to any part of the relief prayed in the bill of complaint.

Wherefore, the premises considered, these defendants pray that this Court on the hearing hereof will dissolve the temporary injunction heretofore issued and will dismiss the bill of complaint at the cost of the plaintiff.

LEE PRESSMAN,
CRAMPTON HARRIS,
JOSEPH KOVNER,
J. A. LIPSCOMB,
Attorneys for Defendants named in the first paragraph hereof.

Note: I hereby certify that I have served a copy of the foregoing motion to dismiss and answer upon Honorable Borden Burr, Solicitor of Record for the Plaintiff.

This 17th day of May, 1941.

CRAMPTON HARRIS.

Filed May 17, 1941.

## MOTION OF DEFENDANTS AFFILIATED WITH INTERNATIONAL UNION OF MINE, MILL AND SMELTER WORKERS FOR SUMMARY JUDGMENT AFFIDAVIT IN SUPPORT THEREOF AND ORDER THEREON.

257 (Civil Action No. 5232.)

Now come the defendants, Muscoda Local No. 123, an unincorporated association affiliated with the International Union of Mine, Mill & Smelter Workers, and W. C. Gunnin, Pete Dulaney, R. H. Martin and John Thompson, individually and as officers and members of such Local; and Wenonah Local No. 157, an unincorporated association affiliated with the International Union of Mine, Mill & Smelter Workers, and C. J. McDaniel, W. B. Lemley, R. E. Lemley and Ward Jefferson, individually and as officers and members of such Local; and Iskhooda Local No. 153, an unincorporated association affiliated with the International Union of Mine, Mill & Smelter Workers, and E. A. Sisemore, L. H. McBrayer, Elmore Mitchell, and Dennis Hart, individually and as officers and members of such Local; and Van D. Jones, C. L. Pegues, and Frank Allen, individually and as officers of the International Union of Mine, Mill & Smelter Workers, an unincorporated association, and by leave of the Court first had and obtained, move the Court for a summary judgment and for an order dismissing the bill of complaint and dissolving the injunction and for grounds of this motion assign all the grounds separately and severally numbered from 1 to 8 heretofore filed by these defendants in their motion to dismiss the bill of complaint; and in addition thereto assign the following additional grounds separately and severally:

9. The situation has changed since plaintiff filed its bill of complaint claiming irreperable injury if it complied

with the opinion and report of the Wage and Hour Administrator of the Fair Labor Standards Act of 1938 in that on to-wit: May 1, 1941 the plaintiff began to comply with the opinion and report of the Wage and Hour Administrator and has been paying these defendants for work time computed in accordance with the determination and finding of said Wage and Hour Administrator.

10. The plaintiff is no longer in need of a declaratory judgment because it began to comply with the opinion and report of the Wage and Hour Administrator and began to pay these defendants and its other employees in accordance with such opinion and report on May 1, 1941, and is still complying therewith.

And in support thereof do submit the affidavit of W. C. Gunnin, hereto attached and made a part hereof the same as if set out herein.

LEE PRESSMAN,
CRAMPTON HARRIS,
JOE KOVNER,
J. A. LIPSCOMB.

5 20 41 The above motion is overruled and denied.

T. A. MURPHREE,
Dist. Judge.

Filed in open Court on May 20, 1941.

T. A. MURPHREE,
Dist. Judge.

State of Alabama,
Jefferson County.

Before Me, the undersigned authority in and for said County in said State, personally appeared W. C. Gunnin, who being by me first duly sworn, deposes and says, that he was on April 4, 1941, and on May 1, 1941, and on May

20, 1941 an employee of Tennessee Coal, Iron and Railroad Company in its ore mine in Jefferson County, Alabama known as Muscoda, and is one of the defendants named in the bill of complaint filed by the Tennessee Coal, Iron and Railroad Company in the District Court of the United States for the Southern Division of the Northern District of Alabama at Birmingham on April 4, 1941.

Deponent further says that on May 1, 1941 the Tennessee Coal, Iron and Railroad Company began to compute the wages due this deponent and defendant and the other defendants named in the bill of complaint and various other employees engaged in mining ores on the basis and in the manner determined as a proper basis and manner for the computation of such wages by the Wage and Hour Administrator of the Fair Labor Standards Act of 1938 in the opinion and report which was attached by the plaintiff to its bill of complaint.

Deponent further says that since May 1, 1941 to the present time the wages of this deponent and defendant and the other defendants named in the bill have been computed in accordance with said opinion and report and that the plaintiff in said suit is complying with said opinion and report in its mine operations.

W. C. GUNNIN.

Sworn to and subscribed before me this the 21st day of May, 1941.

ALEXA ELLIS,
Notary Public.

260 ORDER ON PRE-TRIAL HEARING.

(Civil Action No. 5232.)

This cause coming on to be heard on a regular pre-trial hearing, and all parties being present by counsel, the following action was thereupon taken:

1. The following pleadings and amendments were allowed:

Complaint, and answers of defendants.

Counterclaim of A. F. of L. defendants.

Counterclaim of C. I. O. defendants, to be filed within two weeks from May 20, 1941.

2. It was agreed by all of the parties that the following are all of the issues in controversy in this cause:

a. What constitutes the working time which makes up the workweek of the underground ore mining employees of the plaintiff within the meaning of Section 7 of the Fair Labor Standards Act of 1938.

(1) In reference to "a", above, the plaintiff contends that such workweek does not include that portion of the time spent by the underground ore mining employees in being transported or walking to and from their usual working places.

(2) In reference to "a", above, the defendants contend that the workweek covers all time from portal to portal as announced in the opinion and report of the Wage & Hour Administrator under the Fair Labor Standards Act on March 23, 1941, and also includes aggregate of the time

spent on the surface in obtaining and returning lamps, carbide and tools and in checking in and out.

b. If the Court determines issue "a" adversely to the plaintiff, the Court will further determine whether or not the defendants and other underground iron ore employees who are now or who hereafter may become parties are entitled to recover against the plaintiff, and if so, how much.

On the consideration of "b", above, the parties shall have the right and opportunity of presenting for the Court's consideration all of their respective claims, rights and defenses.

3. The following facts are agreed upon as true and without proof thereof:

(a) Suit is brought in the correct name of the proper plaintiff and against the correct defendants in their proper names.

(b) Plaintiff is, and during all of the period of time herein involved was, a corporation organized under the laws of the state as alleged in its complaint; that the plaintiff is a resident of said state of its incorporation authorized to transact business in the State of Alabama, and it has a principal place of business and mining and manufacturing operations in Jefferson County, State of Alabama.

(c) All the defendants named in the complaint are citizens and residents of Jefferson County, Alabama.

(d) It is admitted that this is a class section in which the Court shall determine whether or not the named de-

fendants fairly represent the class of underground iron ore employees of the plaintiff.

4. The following exhibits were agreed upon as authentic and admissible as evidence without proof.

(a) Exhibit A to the complaint, subject to verification by the defendants.

(b) Exhibit B to the complaint, subject to verification and admissibility.

(c) Subject to verification, and admissibility, the papers marked respectively Exhibits 3, 3-A, 3-B and 3-D, were sent by the Administrator of the Wage and Hour Division to and were received by the respective plaintiffs, and the paper marked Exhibit 3-C is a correct copy of the petition filed by the respective plaintiffs asking for a reconsideration of the "Modified Portal to Portal Wage Hour Decision."

(d) Subject to verification and admissibility, all government documents, as listed:

(1) The papers marked respectively Exhibits 4 and 4-A to 4-H, both inclusive, are releases issued by the United States Department of Labor, Wages and Hours Division, and given publicity to plaintiffs and the public in general.

(2) Publication of United States Department of the Interior, Harold L. Ickes, Secretary, Bureau of Mines, R. R. Sayres, Director, United States Government Printing Office, Washington, 1941. (Exhibit No. 7.)

(3) Release of January 15, 1941, United States Department of the Interior, Bureau of Mines, R. R. Sayres, Di-

rector, Mineral Market Report, M. M. S. No. 885. (Exhibit No. 8.)

(4) Publication of United States Department of the Interior, Harold L. Ickes, Secretary, Bureau of Mines, R. R. Sayres, Director, "Lead", United States Government Printing Office, Washington, 1941. (Exhibit No. 9.)

(5) Publication of United States Department of the Interior, Harold L. Ickes, Secretary, Bureau of Mines, R. R. Sayres, Director, "Zinc", United States Government Printing Office, Washington 1941. (Exhibit No. 10.)

(6) Publication of United States Department of the Interior, Harold L. Ickes, Secretary, Bureau of Mines, R. R. Sayres, Director, "Cooper", United States Government Printing Office, Washington, 1941. (Exhibit No. 11.)

(7) Release of United States Department of the Interior, Bureau of Mines, April 25, 1941, Mineral Market Reports, M. M. S. No. 907. (Exhibit 11-A.)

(8) Release of United States Department of the Interior, Bureau of Mines, January 25, 1941, Mineral Market Reports, M. M. S. No. 877. (Exhibit 11-B.)

(9) Release of United States Department of the Interior, Bureau of Mines, January 27, 1941, Mineral Market Reports, M. M. S. No. 878. (Exhibit 11-C.)

(10) Publication of the United States Department of the Interior, Harold L. Ickes, Secretary, Bureau of Mines, R. R. Sayres, Director, "Bituminous Coal", United States Government Printing Office, Washington, 1940. (Exhibit 12.)

(11) Publication of the United States Department of the Interior, Harold L. Ickes, Secretary, Bureau of Mines,

R. R. Sayres, Director, "Pennsylvania Anthracite", United States Government Printing Office Washington, 1940.

(12) Publication of United States Department of the Interior, Bituminous Coal Division, February 15, 1941, "Production, Stocks and Consumption of Coal". (Exhibit 13-A.)

(13) National Recovery Administration, Approved Code No. 24, Registry No. 702-45, Code of Fair Competition for the Bituminous Coal Industry, as approved September 18, 1933, including amendments 1 to 3, inclusive. (Exhibit No. 14.)

(14) It is admitted that no Codes were ever adopted or promulgated for the iron ore industry or for any mining industry other than the Bituminous Coal Industry.

(15) 26 Opinions of United States Attorney Generals, p. 64,—"Eight-hour Law—Reclamation Service." (Exhibit No. 16.)

(16) 26 Opinions of United States Attorney Generals, p. 605,—"Eight-hour Law—Hours of Service of Lock Tenders, Etc." (Exhibit No. 17.)

(17) 27 Comptroller of the Treasury, p. 1060, "Traveling Expenses Railway Postal Clerks". (Exhibit No. 18.)

(18) 9 Decisions of Comptroller General, p. 200, A-29317, "Compensation—Extra Pay for Night Work—Railway Postal Clerks." (Exhibit No. 19.)

(19) 14 Decisions of Comptroller General, p. 907, A-61311. "Compensation—Overtime—Forty-Hour Week." (Exhibit No. 20.)

(20) Opinion of the Attorney General of the United States, dated August 8, 1939, "Application of the Eight Hour Law to the Civilian Conservation Corps." (Exhibit No. 21.)

(e) Tennessee Coal, Iron & Railroad Company Rules and Regulations for Iron Ore Miners, marked A. F. of L. Exhibit A, subject to verification and admissibility.

(f) Notice of Compliance, A. F. of L. Exhibit B and Minutes, A. F. of L. Exhibit C; subject to verification and admissibility.

(g) Contracts between plaintiff and A. F. of L. unions, subject to verification and admissibility, marked A. F. of L. Exhibits D and E.

5. It is agreed that the provisions of this order shall be applicable, *mutatis mutandis*, to cases number 5233 and 5234 pending in the above named division of this Court.

It is therefore Ordered by the Court that all of the above named allowances and agreements be, and the same are hereby binding upon all parties in the above styled cause, unless this order be hereafter modified by order of the Court.

Done this 22nd day of May, 1941.

T. A. MURPHREE,
United States District Judge.

Filed May 22, 1941.

ORDER SETTING CASE DOWN FOR TRIAL ON THE MERITS AND DECREES ON VARIOUS MOTIONS, ETC

266 (Civil Action No. 5232.)

This cause coming on to be heard on the 20th and 21st of May, 1941, there being present in Court all parties represented by their counsel and the matters hereinafterwards ruled upon being heard, argued, and considered, it is accordingly ordered, adjudged, and decreed by the Court as follows:

1. That the request of those defendants referred to as representing that group of plaintiff's employees affiliated with the American Federation of Labor and represented by Attorneys Smith, Quinn, and Spencer to withdraw their motions asking for the dismissal of the complaint herein be and the same hereby is granted, and said motions be and they hereby are withdrawn.

2. That the motion of those defendants referred to as representing that group of plaintiff's employees affiliated with the International Union of Mine, Mill & Smelter Workers and represented by Attorneys, Pressman, Harris, and Lipscomb to dismiss the complaint herein be and the same hereby is overruled, to which ruling of the Court said defendants, separately and severally, except.

3. That the motions of those defendants referred to as representing that group of plaintiff's employees affiliated with the International Union of Mine, Mill & Smelter Workers and represented by Attorneys Pressman, Harris and Lipscomb for a summary judgment against the plaintiff and for the dismissal and dissolution of the restraining order for preliminary injunction heretofore issued be and the same hereby are overruled, to which rul-

ing of the Court said defendants, separately and severally, except.

4. It is further ordered that the defendants referred to as representing that group of plaintiff's employees affiliated with the International Union of Mine, Mill & Smelter Workers and represented by Attorneys Pressman, Harris, and Lipscomb be and they hereby are given two weeks from the date of this order to file an amendment to their answers, setting up in such form as they may be advised their claims or counter-claims against the plaintiff.

5. It is further ordered that said case be and the same hereby is set down for trial on the merits on June 23, 1941, at ten o'clock A. M., in accordance with the pre-trial order this day made.

Dated this 20th day of May, 1941.

T. A. MURPHREE,
District Judge.

Filed May 26, 1941.

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Notice of hearing on Motion of Philip B. Fleming, Administration of the Wage & Hour Division, U. S. Dept., of Labor for leave to Intervene, omitted from the printed record, pursuant to Rule 23 of this Court.

## MOTION OF PHILIP B. FLEMING, ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR, FOR LEAVE TO INTERVENE.

269 (Civil Action No. 5232.)

Philip B. Fleming, Adiminstrator of the Wage and Hour Division, United States Department of Labor, moves for leave to intervene and become a party to this action in order to assert the claims and defenses set forth in his proposed pleading, a copy of which is hereto attached, on the following grounds:

I.

The object of plaintiff's petition is to obtain an interpretation of the term "workweek" contained in Section 7 of the Fair Labor Standards Act of 1938, which is contrary to the interpretation placed upon said term by the Administrator of the Wage and Hour Division of the United States Department of Labor.

II.

Plaintiff further alleges in its complaint that said interpretation by the Administrator of the Wage and Hour Division of the United States Department of Labor violates and is repugnant to the Fifth Amendment to the Constitution of the United States.

III.

Philip B. Fleming, Administrator of the Wage and Hour Division of the United States Department of Labor, is directly and solely responsible for the administration of the Fair Labor Standards Act of 1938. Any determination of the interpretation to be placed upon any provisions of the Act will directly affect the administration of the said Act. Plaintiff in its petition has invited the Admini-

strator of the Wage and Hour Division to intervene in this action.

IV.

For the foregoing reasons Philip B. Fleming, Administrator of the Wage and Hour Division of the United States Department of Labor, has an interest in the above-entitled cause and seeks to assert his claims and defenses, presenting both questions of law and fact which are common to the main action.

V.

Accompanying this motion is the pleading of Philip B. Fleming, Administrator of the Wage and Hour Division of the United States Department of Labor, to plaintiff's petition.

Wherefore, Philip B. Fleming, Administrator of the Wage and Hour Division of the United States Department of Labor, prays that he be allowed to intervene in the above-entitled cause, and that he be permitted to file his pleading herein, a copy of which is attached.

GERARD D. REILLY,
Solicitor of Labor.
IRVING J. LEVY,
Assistant Solicitor in Charge of Litigation.
JEROME A. COOPER,
Regional Attorney.
ABNER BRODIE,
United States Department of Labor.
Attorneys for Philip B. Fleming, Administrator of the Wage and Hour Division, United States Department of Labor.

Post Office Address:
Wage and Hour Division,
U. S. Department of Labor,
1007 Comer Building,
Birmingham, Alabama.
or
Wage and Hour Division,
U. S. Department of Labor,
Washington, D. C.

Filed May 24, 1941.

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On May 24, 1941, notice and motion identical with the foregoing were filed in the case of Sloss-Sheffield Steel & Iron Co. v. Sloss Red Ore Local No. 109, Civil Action No. 5233, and in the case of Republic Steel Corporation v. Raimund Local No. 121, Civil Action No. 5234.

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## ANSWER OF PHILIP B. FLEMING, ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR, INTERVENER.

271 (Civil Action No. 5232.)

Philip B. Fleming, Administrator of the Wage and Hour Division, United States Department of Labor, as his pleading setting forth the claim or defense for which intervention is sought, respectfully shows that:

### First Defense.

I.

Intervener neither admits nor denies the allegations of Section I of plaintiff's petition but leaves plaintiff to its proof thereof.

II.

With respect to the allegations of Section II of plaintiff's petition regarding the working conditions of plaintiff's employees at its ore mines, intervener alleges that their working conditions are as set forth in Section II, entitled "The Miner's Day," of the Opinion and Report which is annexed to the petition as Exhibit A. Except as herein otherwise stated, the intervener is without knowledge or information sufficient to form a belief respecting any other material allegations of section II of plaintiff's petition.

III.

Intervener has no knowledge or information sufficient to form a belief as to the truth of the allegations contained in section III of the petition entitled "The Defendants" except that intervener admits that the Administrator of the Wage and Hour Division, United States Department of Labor, is interested in the construction of Section 7 of the Fair Labor Standards Act of 1938, but not as prayed for in plaintiff's petition.

IV.

Intervener has no knowledge or information sufficient to form a belief as to the truth of the allegations contained in section IV of the petition entiled "Statement of Controversy". Intervener denies that the material allegations of fact contained in said section constitute an actual controversy within the meaning of the Federal Declaratory Judgment Act (26 U. S. C., Section 400), or otherwise. Intervener admits that Section 7 of the Fair Labor Standards Act is as stated in Section IV of plaintiff's petition. Intervener alleges that there are differences of opinion respecting the interpretation of Section 7 of the Fair Labor

Standards Act of 1938, which differences of opinion are described in section IV of Exhibit A, annexed to plaintiff's petition.

Intervener alleges that the proper interpretation of Section 7 of the Fair Labor Standard Act of 1938 is as set forth in the Opinion and Report, a copy of which is annexed to plaintiff's petition as Exhibit A.

V.

Regarding the allegations contained in section V of plaintiff's petition entitled "The Opinion of the Administrator", intervener admits that an opinion and report in the form annexed to the petition and marked Exhibit A was issued. Further, to the extent that they are material or relevant, intervener refers to reports, releases, bulletins, and opinions of the Wage and Hour Division of the United States Department of Labor, mentioned in plaintiff's petition for the contents thereof. Except as herein otherwise answered, the material allegations of fact contained in said section V of plaintiff's petition are denied. Intervener neither admits nor denies arguments, conclusions, characterizations, and statements other than material allegations of fact contained in said section V of plaintiff's petition.

Intervener alleges that the proper interpretation of Section 7 of the Fair Labor Standards Act of 1938 is as set forth in the Opinion and Report, a copy of which is annexed to plaintiff's petition as Exhibit A.

VI.

For the terms of the Fair Labor Standards Act of 1938, mentioned in section VI of plaintiff's petition entitled "Necessity For the Relief of a Declaratory Judgment" in-

tervener refers to the Act. Regarding any material allegations of fact in section VI of plaintiff's petition, intervener has no knowledge or information sufficient to form a belief. Intervener neither admits nor denies arguments, conclusions, characterizations, and statements other than material allegations of fact contained in said section VI of plaintiff's petition. Intervener denies that there is any necessity for relief by a declaratory judgment.

VII.

Intervener has no knowledge or information sufficient to form a belief regarding the truth of any material allegations of fact in section VII of plaintiff's petition. Intervener neither admits nor denies arguments, conclusions, characterizations, and statements other than material allegations of fact contained in said section VII of plaintiff's petition.

VIII.

Intervener denies the material allegations of fact contained in section VIII of plaintiff's petition. Intervener neither admits nor denies arguments, conclusions, characterizations, and statements other than material allegations of fact contained in said section VIII of plaintiff's petition.

IX.

Intervener denies the material allegations of fact contained in section IX of plaintiff's petition. Intervener neither admits nor denies arguments, conclusions, characterizations, and statements other than material allegations of fact contained in said section IX of plaintiff's petition. Intervener alleges that the working conditions of employees in plaintiff's ore mines are set forth in Section

II of Exhibit A, annexed to plaintiff's petition. Intervener alleges that the terms of private contracts can not alter the proper interpretation of the terms of the Fair Labor Standards Act. Intervener alleges further that the terms of the contracts referred to in Section IX of plaintiff's petition or any other contracts can not relieve plaintiff of its obligations imposed by the Fair Labor Standards Act of 1938 and defendants can not waive by contract or otherwise the benefit of said Act.

X.

Intervener has no knowledge or information sufficient to form a belief respecting the allegations of paragraph X of plaintiff's petition.

Intervener alleges that the terms of private contracts can not alter the proper interpretation of the terms of the Fair Labor Standards Act. Intervener alleges further that the terms of the contracts referred to in section IX of plaintiff's petition or any other contracts cannot relieve plaintiff of its obligations imposed by the Fair Labor Standards Act of 1938 and defendants can not waive by contract or otherwise the benefit of said Act. Intervener alleges further that defendants can not be estopped by the terms of the alleged contracts referred to in section X of the plaintiff's petition or otherwise from claiming the benefits of the Fair Labor Standards Act.

Second Defense.

This Court has no jurisdiction over plaintiff's petition under the Federal Declaratory Judgment Act because there is no actual controversy within the meaning of the said Act, said petition does not present a case or controversy within the meaning of Article III, Section 2 of the United States Constitution, plaintiff is not threatened with

or in danger of suffering any irreparable injury, plaintiff has a complete and adequate remedy at law with respect to any rights arising out of the matters alleged.

GERARD D. REILLY,
Solicitor of Labor.
IRVING J. LEVY,
Assistant Solicitor in Charge of Litigation.
JEROME A. COOPER,
Regional Attorney.
ABNER BRODIE,
United States Department of Labor.
Attorneys for Philip B. Fleming, Administrator of the Wage and Hour Division, United States Department of Labor.

Post Office Address:
Wage and Hour Division,
U. S. Department of Labor,
1007 Comer Building,
Birmingham, Alabama.
or
U. S. Department of Labor,
Washington, D. C.

Filed June 7, 1941.

## ANSWER OF PHILIP B. FLEMING, ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR, INTERVENER.

276 (Civil Action No. 5233.)

Philip B. Fleming, Administrator of the Wage and Hour Division, United States Department of Labor, as his pleading setting forth the claim or defense for which intervention is sought, respectfully shows that:

First Defense.

I.

Intervener neither admits nor denies the allegations of section I of plaintiff's petition but leaves plaintiff to its proof thereof.

II.

With respect to the allegations of Section II of plaintiff's petition regarding the working conditions of plaintiff's employees at its ore mines, intervener alleges that their working conditions are as set forth in section II, entitled "The Miner's Day," of the Opinion and Report which is annexed to the petition as Exhibit A. Except as herein otherwise stated, the intervener is without knowledge or information sufficient to form a belief respecting any other material allegations of section II of plaintiff's petition.

III.

Intervener has no knowledge or information sufficient to form a belief as to the truth of the allegations contained in section III of the petition entitled "The Defendants" ex-

cept that intervener admits that the Administrator of the Wage and Hour Division, United States Department of Labor, is interested in the construction of Section 7 of the Fair Labor Standards Act of 1938.

IV.

Intervener has no knowledge or information sufficient to form a belief as to the truth of the allegations contained in section IV of the petition entitled "Statement of Controversy." Intervener denies that the material allegations of fact contained in said section constitute an actual controversy within the meaning of the Federal Declaratory Judgments Act (26 U. S. C., Section 400), or otherwise. Intervener admits that Section 7 of the Fair Labor Standards Act is as stated in section IV of plaintiff's petition. Intervener alleges that there are differences of opinion respecting the interpretation of Section 7 of the Fair Labor Standards Act of 1938, which differences of opinion are described in section IV of Exhibit A, annexed to plaintiff's petition.

Intervener alleges that the proper interpretation of Section 7 of the Fair Labor Standards Act of 1938 is as set forth in the Opinion and Report, a copy of which is annexed to plaintiff's petition as Exhibit A.

V.

Regarding the allegations contained in Section V of plaintiff's petition entitled "The Opinion of the Administrator" intervener admits that an opinion and report in the form annexed to the petition and marked Exhibit A was issued. Further, to the extent that they are material or relevant, intervener refers to reports, releases, bulletins, and opinions of the Wage and Hour Division of the United States Department of Labor, mentioned in plaintiff's peti-

In Testimony Whereof, witness the signatures of the undersigned, this 11th day of Sept., 1940.

SLOSS RED ORE LOCAL #109,
I. U. of M. M. & S. W.,
(S.) By JOHN HILL,
President.
(S.) By JESSE GAINES,
Vice-President.
(S.) By W. A. O'NEAL,
Chairman Executive Board.
(S.) By VAN D. JONES,
Board Member District #5,
I. U. of M. M. & S. W.

SLOSS-SHEFFIELD STEEL & IRON COMPANY,
(S.) By ROY RATLIFF,
General Manager.

Outside Rates.

| Occupation | Hourly Rate | Amount Per Shift | Hours Per Shift |
|---|---|---|---|
| Truck Driver | $.540 | $4.32 | 8 |
| Teamster | .505 | 4.04 | 8 |
| Engineers—Main Hoist | .770 | 7.70 | 10 |
| Dumpers | .535 | 4.28 | 8 |
| Tipplemen | .535 | 4.28 | 8 |
| Conveyor Men | .535 | 4.28 | 8 |
| Weighmen | .675 | 6.08 | 9 |
| R. R. Car Loaders | .535 | 4.28 | 8 |
| Crusher Men | .635 | 5.08 | 8 |
| Machinist | .820 | 6.56 | 8 |
| Machinist Helper—1st Class | .570 | 4.56 | 8 |
| Machinist Helper—2nd Class | .540 | 4.32 | 8 |
| Blacksmith | .845 | 6.76 | 8 |
| Blacksmith Helper | .540 | 4.32 | 8 |
| Carpenter | .650 | 5.20 | 8 |

| Occupation | Hourly Rate | Amount Per Shift | Hours Per Shift |
|---|---|---|---|
| Carpenter Helpers | .505 | 4.04 | 8 |
| Car Repairmen | .635 | 5.08 | 8 |
| Car Repairmen Helpers | .580 | 4.64 | 8 |
| Drill Sharpener | .740 | 5.92 | 8 |
| Compressor Man | .695 | 6.26 | 9 |
| Watchman | .515 | 4.12 | 8 |
| Laborers | .450 | 3.60 | 8 |
| Slate Pickers | .450 | 3.60 | 8 |
| Ore Inspector | .580 | 4.64 | 8 |

Note: One and one-half times the above hourly rates will be paid for all time in excess of eight (8) hours per day or forty (40) hours per week, excepting supervisors, foremen and a few occupations where application of this rule is not practical.

Inside Rates.

| Occupation | Hourly Rate | Amount Per Shift | Hours Per Shift |
|---|---|---|---|
| Company drillers | $.755 | $6.04 | 8 |
| Driller helpers | .675 | 5.40 | 8 |
| Motormen | .685 | 5.48 | 8 |
| Coupler | .600 | 4.80 | 8 |
| Rockmen | .685 | 5.48 | 8 |
| Rockmen Helpers | .596 | 4.76 | 8 |
| Track Cleaners | .506 Ton | ... | ... |
| Timbermen | .685 | 5.48 | 8 |
| Timbermen helpers | .595 | 4.76 | 8 |
| Pipemen | .635 | 5.08 | 8 |
| Pipemen helpers | .595 | 4.76 | 8 |
| Chainers-Contract—.022 per ton or | .625 | 5.00 | 8 |
| Company chainers | .625 | 5.00 | 8 |
| Company chainer helpers | .600 | 4.80 | 8 |

| Occupation | Hourly Rate | Amount Per Shift | Hours Per Shift |
|---|---|---|---|
| Engineers—Main hoist | .755 | 6.42 | 8½ |
| Engineers—Auxiliary hoist | .685 | 5.48 | 8 |
| Stablemen | .635 | 5.08 | 8 |
| Rock, Timber and Track Foremen | .755 | 6.04 | 8 |
| Trackmen | .685 | 5.48 | 8 |
| Trackmen helpers | .595 | 4.76 | 8 |
| Roller Men | .605 | 4.84 | 8 |
| Pumpers | .605 | 4.84 | 8 |
| Electric Repairmen | .795 | 6.36 | 8 |
| Machinist | .795 | 6.36 | 8 |
| Miner on Company work* | .625 | 5.00 | 8 |

*See Section 8, (c) and (d) for application.

Note: One and one-half times the above hourly rates will be paid for all time in excess of eight (8) hours per day or forty (40) hours per week, excepting supervisors, foremen and a few occupations where application of this rule is not practical.

Hand Loaded. Ore

Places 18 Feet or Less in Width

Basic Tonnage = 35 Tons Per Shift

5 Man Crew

| Occupation | No. Men | Rate Per Ton |
|---|---|---|
| Drill Man | 1 | $ .153 |
| Drill Man Helper | 1 | .138 |
| Muckers | 3 | .417 |
| Total | 5 | $ .708 |

Any additional tonnage produced will be paid for at the above rates.

When conditions develop beyond the control of a crew that prevents them from loading the basic tonnage and they are required to stay at the working place for the full 8-hour shift, wages equivalent to 90% of the basic tonnage earnings will be paid the crew on a pay period basis.

Hand Loaded Ore

Places Over 18 Feet in Width

Basic Tonnage = 43 Tons Per Shift

5 Man Crew

| Occupation | No. Men | Rate Per Ton |
|---|---|---|
| Drill Man | 1 | $ .129 |
| Drill Man* | .. | .112* |
| Drill Man Helper | 1 | .116 |
| Muckers | 3 | .351 |
| Total | 5 | $ .708 |

*To credit of Head Drill Man for Explosive and Supplies.

Any additional tonnage produced will be paid for at the above rates.

When conditions develop beyond the control of a crew that prevents them from loading the basic tonnage and they are required to stay at the working place for the full 8-hour shift, wages equivalent to 90% of the basic tonnage earnings will be paid the crew on a pay period basis.

## Drag Loaded Ore

### Basic Tonnage — 100 Tons Per Shift

### 15 Man Crew

### 8 Men One Shift: 7 Men Opposite Shift

| Occupation | No. Men | Rate Per Ton |
|---|---|---|
| Head Miner | 1 | $ .041 |
| Head Miner | .. | .110* |
| Drag Engineers | 2 | .062 |
| Drill Men | 4 | .121 |
| Drill Men Helpers | 2 | .053 |
| Muckers | 4 | .106 |
| Haulage Engineers | 2 | .046 |
| Total | 15 | $ .539 |

*To credit of Head Miner for Explosives and Supplies.

Any additional tonnage produced will be paid for at the above rates.

When conditions develop beyond the control of a crew that prevents them from loading the basic tonnage and they are required to stay at the working place for the full 8-hour shift, wages equivalent to 80% of the basic tonnage earnings will be paid the crew on a pay period basis.

## Drag Loaded Ore

### Headings Only

### Basic Tonnage = 75 Tone Per Shift

### 8 Man Crew

| Occupation | No. Men | Rate Per Ton |
|---|---|---|
| Head Miner | 1 | $ .041 |
| Drag Engineer | 1 | .083 |
| Drill Men | 2 | .160 |
| Drill Men Helper | 1 | .070 |
| Muckers | 2 | .140 |
| Haulage Engineer | 1 | .060 |
| Total | 8 | $ .554 |

Any additional tonnage produced will be paid for at the above rates.

When conditions develop beyond the control of a crew that prevents them from loading the basic tonnage and they are required to stay at the working place for the full 8-hour shift, wages equivalent to 80% of the basic tonnage earnings will be paid the crew on a pay period basis.

### Yardage Rates

| | |
|---|---|
| Slopes, 12′ wide or less | $17.80 per lin. yd. |
| Slopes, 18′ wide | 9.90 per lin. yd. |
| Headings, 18′ wide or less | 9.90 per lin. yd. |
| Upsets | 7.85 per lin. yd. |
| Stope necks, 12′ wide or less | 17.80 per lin. yd. |
| Stope necks, 15′ wide or less | 13.90 per lin. yd. |
| Stope necks, 18′ wide or less | 9.90 per lin. yd. |
| Splitting a single stope into a double stope | 25.00 per lin. yd. |

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## EXHIBIT "C".

### Agreement.

This agreement dated March 17, 1941, and entered into by and between the Sloss-Sheffield Steel & Iron Company, (hereinafter referred to as the "Company") and Ruffner Iron Ore Miners Union No. 512 of the International Union of Mine, Mill and Smelter Workers, (hereinafter referred to as the "Union") on behalf of employees employed in the Production and Maintenance Departments of the Ruffner Red Ore Mine, located at Irondale, Alabama.

### Section 1—Recognition.

(a) The Union shall be and is hereby recognized as the exclusive bargaining agency for the employees in the Production and Maintenance Departments for the purpose of collective bargaining with respect to rates of pay, wages, hours of employment and other conditions of employment.

(b) The term employee used in this Agreement does not include foremen, supervisors, technical and clerical employees.

(c) It is distinctly understood that the Management of the mine and the direction of the working force, and the right to hire and discharge are vested exclusively in the Company.

### Section 2—Check-Off.

The Company agrees upon individual written authorization by the employee to deduct Union dues in the amount not to exceed one dollar ($1.00) per month from such employee. Initiation and other fees (not to exceed two dollars ($2.00) for any one man, and in sums not to exceed

one dollar ($1.00) per man in any one pay period), wherein individual written authorization has been made to the Company by the employee, shall be deducted by the Company. All such deductions shall be forwarded to the financial secretary of Union No. 512 on or before the tenth of the following month.

In case any employee shall enter suit or process against the Company for the amount deducted under this section pursuant to such check-off paid to its representatives, the Union will reimburse to the Company the amount of any loss sustained by the Company by reasons thereof, including costs and expense of the suit.

Section 3—Mine Committee.

The duties of the Mine Committee shall be confined to the adjustment of disputes arising from this Agreement with the employees represented by them that the mine management and employee, or employees, have failed to adjust. The Mine Committeee shall have no other authority nor exercise any other control, nor in any way interfere with the operation of the mine. The Mine Committee has no authority to direct the working forces in or about the mine or any part thereof. For violation of these clauses or any of them the Committee, or any member thereof, shall be immediately removed from the Committee, and shall be ineligible to serve as a committeeman for six months thereafter.

Section 4—Hours of Work.

(a) Eight hours work per day shall constitute a day's work and forty hours shall constitute a week's work. The eight hours per day means eight hours of work at the usual working place, exclusive of the lunch period.

The Company shall have the right during the life of this Agreement to operate the mine one, two or three eight-hour shifts by different crews of men within each twenty-four hour period.

(b) The eight hours per shift will not apply in case of accident or breakdowns which may temporarily necessitate longer hours for those employees required on account thereof, and also excepting the number of men required to handle man trips and those required to remain on duty while men are entering or leaving the mine.

(c) Time and one-half shall be paid for all work performed in excess of eight hours per day or forty hours per week.

Section 5—Holidays.

The following Holidays shall be observed by the Company—Independence Day, Labor Day, Thanksgiving Day and Christmas Day; except for necessary maintenance or repair work, and those employees whose occupations require continuous duty.

Section 6—Vacations.

(a) Each employee who, prior to June 1st, 1941, shall have been continuously in the service of the Company for a period of three (3) years shall receive a vacation with pay on the following basis:

Three (3) years and less than five (5) years—three (3) working days.

Five (5) years and less than ten (10) years—six (6) working days.

Ten (10) years and less than fifteen (15) years—eight (8) working days.

Fifteen (15) years and over—ten (10) working days.

(b) During the three-year period prior to June 1st, 1941, any employee who voluntarily left the service of the Company for one or more days will not be entitled to vacation pay.

(c) An employee must be in the active service of the Company at time of allotment of vacation to be entitled to same and vacations will, so far as possible, be granted at times most desired by the employees, but the final right to allotment of vacation period is exclusively reserved to the Company in order to insure the orderly operation of the plant.

(d) Service will be considered continuous where employee has not been off payroll more than three months in the past year prior to June 1st, 1941, or a total of fifteen months in past five years prior to June 1st, 1941, through being laid off by the Company account of curtailed operations.

Section 7—Miscellaneous Provisions.

It is agreed to observe during the life of this Contract the same practices and customs in regard to the promotion, or increases and decreases in the working forces, as have been practiced in the past.

Section 8—Wages and Rates of Pay.

(a) The wage rates attached hereto will be the prevailing rates of pay for the duration of this Agreement.

(b) It is agreed that in event general wage advances are granted or decreases made to red ore miners by a majority of the red ore producing companies in this district during the life of this Agreement, it is understood that the question of considering wage adjustments for Ruffner employees will then become a subject for collective bargaining under terms of this agreement.

Section 9—Settlement of Disputes.

If an employee, or employees, shall consider that he or they have any grievance against the Company, an earnest effort shall be made, subject to the terms and provisions of this contract, to adjust same by the following successive steps:

(a) Between employee and his foreman.

(b) Between Mine Committee and Superintendent of the Mine.

(c) Between Mine Committee or Representatives of the Union and the General Superintendent of Ore Mines.

(d) If such grievance arising under the terms of this Contract is not adjusted and settled in the manner herein provided; then such grievance, that has been settled by one of the modes aforesaid provided, shall be submitted to a Board of Arbitration, who shall be appointed to consider such unadjusted grievance, and shall be selected as follows:

Two (2) to be chosen by the Company and two (2) to be chosen by the Union, and these four to choose a fifth member within ten (10) days. If these four fail to agree upon the fifth member, then within ten additional days he shall be chosen by the President of Sloss-Sheffield Steel

& Iron Company and the Board Member of District 5 of the International Union of Mill, Mine and Smelter Workers. The decision of such Board of Arbitration shall be rendered without unreasonable delay, and the decision of a majority of said Board shall be final and binding on all parties involved in such grievance. Any expense incurred by the arbitrators shall be borne equally by the Company and the Union.

(e) There shall be no stoppage of work either by the Company or the Union, until full procedure of methods of settling grievances as outlined in this Agreement have been complied with.

(f) If it shall be determined that an employee has been discharged or suspended without just cause, the Company shall immediately reinstate the employee and compensate him for time lost at his regular rate of pay.

Section 10—General Clauses.

(a) This Agreement may be amended or revised in any of its provisions during its existence, provided such amendments or revisions are approved in writing, and subscribed to by the Union and the Company.

(b) It is understood and agreed that Section 9 (d) (Settlement of Grievances) shall not be effective in the arbitration of wage increases, wage reductions or wage adjustments.

(c) Each section of this Agreement has been arrived at through the process of collective bargaining between representatives of the employees and officials of the Sloss-Sheffield Steel & Iron Company.

Section 11—Effective Period and Termination.

This agreement shall become effective on the 17th day of March, 1941, and shall be operative and remain in full force and effect for two (2) years from said date and from year to year thereafter, subject, however, to the right of either party to terminate the agreement at the end of any yearly period after 17th day of March, 1943, by written notice given to the other party not more than thirty (30) days prior to nor less than fifteen (15) days prior to the end of any such year.

In Testimony Whereof, witness the signatures of the undersigned, this 17th day of March, 1941.

SLOSS-SHEFFIELD STEEL & IRON COMPANY,
By ROY RATLIFF,
General Manager.

RUFFNER MINERS UNION
#512, I. U. of M. M. & S. W.,
By FRANK PARKER,
President.
By HORSEA BICKERSTAFF,
Vice-President.
By GEO. F. DRUMMOND,
Chairman Executive Board.
By VAN D. JONES,
Board Member District #5,
I. U. of M. M. & S. W.

Outside Rates.

| Occupation | Hourly Rate | Amount Per Shift |
|---|---|---|
| Truck Driver | $ .540 | $4.32 |
| Engineer—Main Hoist | .770 | 6.16 |

| Occupation | Hourly Rate | Amount Per Shift |
|---|---|---|
| Tippleman | .535 | 4.28 |
| Weighman | .675 | 5.40 |
| Railroad Car Loader | .535 | 4.28 |
| Machinist | .795 | 6.36 |
| Machinist Helper—1st Class | .570 | 4.56 |
| Blacksmith | .795 | 6.36 |
| Carpenter | .650 | 5.20 |
| Carpenter Helper | .450 | 3.60 |
| Car Repairmen | .635 | 5.08 |
| Car Repairmen Helpers | .580 | 4.64 |
| Compressor Man | .650 | 5.20 |
| Watchman | .515 | 4.12 |
| Laborers | .450 | 3.60 |
| Slate Pickers | .450 | 3.60 |
| Lamp Man | .570 | 4.56 |

Note: One and one-half times the above hourly rates will be paid for all time in excess of eight (8) hours per day or forty (40) hours per week.

Inside Rates.

| Occupation | Hourly Rate | Amount Per Shift |
|---|---|---|
| Drillers* | $ .755 | $6.04 |
| Muckers* | .610 | 4.88 |
| Track Cleaners | .595 | 4.76 |
| Rockmen | .685 | 5.48 |
| Rockmen Helpers | .595 | 4.76 |
| Timbermen | .685 | 5.48 |
| Timbermen Helpers | .595 | 4.76 |
| Rock and Timber Foreman | .755 | 6.04 |
| Pipeman | .635 | 5.08 |
| Pipeman Helper | .595 | 4.76 |
| Chainers—Main Hoist | .625 | 5.00 |
| Chainers—Auxiliary Hoists | .600 | 4.80 |

| Occupation | Hourly Rate | Amount Per Shift |
|---|---|---|
| Engineers—Auxiliary Hoists .... | .685 | 5.48 |
| Trackman ..... | .685 | 5.48 |
| Trackman Helpers ..... | .595 | 4.76 |
| Roller Man ..... | .605 | 4.84 |
| Laborers ..... | .595 | 4.76 |
| Electrical Repairman ..... | .795 | 6.36 |
| Drag Operator* ..... | .755 | 6.04 |
| Face Man* ..... | .595 | 4.76 |
| Chute Man* ..... | .595 | 4.76 |
| Spotting Hoist Engineer* ..... | .595 | 4.76 |

*See pages 9, 10 and 11 for application for bonus in addition to above rates.

Note: One and one-half times the above hourly rates will be paid for all time in excess of eight (8) hours per day or forty (40) hours per week.

*Tonnage Bonuses

Drag Loading

Normal Crew of Six (6) Men—

Base 80 Tons Per Shift of Eight (8) Hours Worked

All excess tonnage above base of 80 tons per day, computed on a bimonthly basis, will be paid for at the rate of $0.30 per ton, divided between the crew as follows:

| | |
|---|---|
| Drag Operator ..... | $ .07 |
| Drillers (2) ..... | .14 |
| Face Man ..... | .03 |
| Chute Man ..... | .03 |
| Spotting Hoist Engineer ..... | .03 |

*Tonnage Bonuses

Hand Loaded Entries

Normal Crew of Three (3) Men—

Base 25 Tons Per Shift of Eight (8) Hours Worked

All excess tonnage above base of 25 tons per day, computed on a bimonthly basis, will be paid for at the rate of $0.48 per ton, divided between crew members as follows:

| | |
|---|---|
| Driller | $0.18 |
| Muckers (2) | .30 |

*Tonnage Bonuses

Hand Loaded Slopes

Normal Crew of Three (3) Men—

Base 18 Tons Per Shift of Eight (8) Hours Worked

All excess tonnage above base of 18 tons per day, computed on a bimonthly basis, will be paid for at the rate of $0.48 per ton, divided between crew members as follows:

| | |
|---|---|
| Driller | $0.18 |
| Muckers | .30 |

MOTION OF PETITIONER-PLAINTIFF SLOSS-SHEFFIELD STEEL AND IRON COMPANY FOR TEMPORARY RESTRAINING ORDER OR PRELIMINARY INJUNCTION.

157 (Civil Action No. 5233.)

Comes the plaintiff in the above entitled cause and adopting the allegation of its bill of complaint as a part of this motion, moves the Court to issue herein a temporary restraining order or preliminary injunction, restraining and enjoining said defendants and their agents, representatives, and all other underground employees of the plaintiff made parties defendant hereto as a class, from prosecuting any suit or claim of any nature whatsoever against plaintiff for any additional wages or compensation claimed to be due them under the terms and provisions of the said Act for any portion of their time, including the lunch period, spent in being transported or going to and from their actual places of work, and that the terms of said injunction be as set forth in the prayer of said bill of complaint.

S. M. BRONAUGH,
Attorney for Plaintiff.

Filed April 5, 1941.

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ORDER SETTING MOTION OF PETITIONER-PLAINTIFF SLOSS SHEFFIELD-STEEL AND IRON COMPANY FOR TEMPORARY RESTRAINING ORDER OR PRELIMINARY INJUNCTION FOR HEARING.

158 (Civil Action No. 5233.)

This matter coming on to be heard on the motion and prayer of the plaintiff for the issuance of a temporary

restraining order or preliminary injunction, it is Ordered by the Court that said motion be and the same hereby is set for hearing in open Court on the 17th day of April, 1941, at 10 o'clock, A. M.

It is further Ordered that service of a copy of the bill of complaint herein, of said motion, and of this order be made upon the defendants in accordance with Rule 5(b) of the Rules of Civil Procedure, and that such service be made not less than five (5) days before the time set for hearing.

This 5th day of April, 1941.

T. A. MURPHREE,
Judge.

Filed April 5, 1941.

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RETURN OF SERVICE OF PROCESS ON PETITION OF SLOSS-SHEFFIELD STEEL & IRON COMPANY, omitted from the printed record, pursuant to Rule 23 of this Court.

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## PETITION OF REPUBLIC STEEL CORPORATION

160 (Civil Action No. 5234.)

I.

Allegations of Jurisdiction.

(a) That petitioner and plaintiff (hereinafter referred to as "plaintiff") is a corporation organized under the

laws of the State of New Jersey, and a resident of said State, authorized to transact business in the State of Alabama, and having one of its principal places of business, and mining and manufacturing operations, in Jefferson and Etowah Counties, State of Alabama;

(b) All of the defendants are citizens and residents of Jefferson County, State of Alabama;

(c) The matters in controversy, exclusive of interest and costs, exceed the sum of $3,000;

(d) That jurisdiction is also founded on the existence of a federal question in that it is a suit arising under a law regulating commerce;

(e) Jurisdiction is also founded in that this action arises under the Constitution of the United States and the Fifth Amendment to the Constitution of the United States;

(f) Jurisdiction is also founded on the existence of a question arising on a particular statute in that the action arises under the Act of June 25, 1938, Public Act No. 718 of the 75th Congress, Chapter 676, Sections 1 to 19, 52 Stat. 1060, Title 29, U. S. C., Sections 201 to 219, as amended by the Act of Congress of August 9, 1939, Public Act No. 344 of the 76th Congress, commonly called the "Fair Labor Standards Act of 1938", as hereinafter more fully appears.

(g) This action is to secure a declaratory judgment and such incidental injunctive relief as may be proper under the provisions of the Federal Declaratory Judgment Act, Title 28, U. S. C. A. 400, the Judicial Code, Section 274(d); the Act of March 3, 1911, Chapter 231,

Paragraph 274(d), as amended June 14, 1934, Chapter 512; 48 Stat. 955, as amended by the Act of August 30, 1935; C 829, Paragraph 405; 47 Stat. 1027.

(h) This action is also to secure such other different and more general relief as may be proper under the allegations herein contained.

## II.

### The Plaintiff and Its Operations.

Plaintiff owns and operates in Jefferson County, Alabama, two underground iron ore mines, one at Spalding (this mine is not involved in this proceeding) and the other at Raimund. The ore mine at Raimund has two openings. Access to the mine workings is by inclined slopes of approximately 45 degrees with vertical depth of cover of approximately 1,000 feet. The workable seam of ore averages about 6½ feet. The method of mining is a modified room and pillar plan, with open stopes. The operating requirements call for an average of approximately 82,000 gross tons of red ore per month (from Raimund and Shannon mines). The plaintiff extracts from said mine iron ore, and said ore is used by the Company in the manufacture of pig iron, some of which pig iron is sold in the open market but the larger portion of the pig iron thus manufactured is used in the manufacture at the Alabama plants of the plaintiff of structural steel, iron fencing, sheets, bars, and other products, such products being sold in various markets in competition with manufacturers of like products. The plaintiff obtains a portion of its supplies and equipment from outside the State of Alabama, and it ships the greater portion of its manufactured products by common carrier to points outside of the State of Alabama, and in some instances to foreign countries.

The plaintiff operates coal mines and uses the coal in the manufacture of its products. The operations in its coal mines, in so far as the questions involved here are related and concerned, are the same operations as the operations in its ore mines. The general custom and procedure in the ore mine is substantially as follows:

Plaintiff employs at its ore mine approximately 645 employees, and of this number 589 are underground employees (these underground employees are the employees of the plaintiff with whom the controversy as hereinafter alleged exists and who are hereinafter made parties defendant hereto). For the convenience of its underground employees the plaintiff provides bath house facilities, the bath house being located a short distance from the mine entrance hereinafter referred to as the "portal". The employees are not compelled to use the bath house facilities and the plaintiff does not require the presence of the underground employees at the bath house at any particular time or in any defined groups. No check-in or check-out is had at the bath house. While the use of the bath house is not obligatory, it is used by substantially all of the plaintiff's employees. The employee, after changing from street clothes to work clothes at the bath house, walks to the "portal".

All underground employees are lowered into the slopes in man skips to a central point called the underground manloading station. From this point the employees proceed on foot to their respective working places. For the purpose of transporting employees to the underground manloading station the plaintiff operates man skips. The employees are not required to ride on any particular man trip but can follow their own wishes in determining which trip they shall ride. Eight to ten man trips are required to lower all the underground employees in the

mine, the first trip leaving at approximately 5:15 A. M. and P. M. and the last trip leaving at approximately 6:30 A. M. and P. M. All men are expected to be at their regular places of work at the starting time, which is 7:00 A. M. day shift operations and 7:00 P. M. night shift operations. Day shift operations cease at 3:00 P. M. and night shift operations cease at 3:00 A. M.

No time is designated for lunch period, and no time is deducted from the eight-hour work period for lunch. After the day's work has been completed the employees walk from their working places and to the underground manloading station and are hoisted in the same manner as they are lowered into the mines.

The time taken in transportation from the portal to the underground manloading station and from the manloading station to the portal, and the time taken in walking from and to the man loading station to and from the usual working place varies, but may be conservatively estimated at not more than 2 hours and not less than 1 hour. The time taken by the employees from the moment they leave the bath house before the beginning of the day's work until the moment they enter the bathhouse at the end of the day's work varies, but may be conservatively estimated as averaging fifteen minutes. Several years prior to the enactment of the Act the plaintiff established in its ore mine an eight-hour day and forty-hour week, with payment of time and one-half for all the time over eight hours in any one day and for all overtime in excess of forty hours in any one week, the eight-hour day meaning eight hours' work in and about the mines at the usual working place, for all classes of labor. All underground mine employees have been paid and accepted their wages on the basis of eight hours per day from 7:00 A. M. or P. M. to 3:00 P. M. or A. M. The plaintiff

has never compensated its underground employees for any portion of their time spent in going to or from or in being transported to and from their actual workplace, and such employees at all times understood and agreed that they should not receive any compensation therefor; and such understanding and agreement has been specifically provided for by agreements, express or implied, between the Company and its underground employees.

The allegations herein set forth as to operations at the present time are substantially in all respects true as to operations for several years prior to the enactment of the Act.

## III.

## The Defendants.

(a) Defendant, Raimund Local 121, affiliated with the International Union of Mine, Mill & Smelter Workers, is an unincorporated association and has been selected by some of plaintiff's employees as their representative for collective bargaining in all matters concerning wages, hours, and conditions of employment, the exact number of the underground employees represented by said Local being unknown to plaintiff.

(b) The individual defendants, John Butler, Lewis Tarrant, and B. G. Stephens, are underground employees of the plaintiff and officers and members of said Raimund Local 121 who have selected said organization as their representative for collective bargaining.

(c) The defendant, Unit No. 8, Brotherhood of Miners of Captive Ore Mines of Alabama, is an unincorporated association not affiliated with any national organization

and has been selected by some of plaintiff's employees (underground) as their representative for collective bargaining in all matters concerning wages, hours, and conditions of employment, the exact number of plaintiff's underground employees who are represented by said Unit being unknown to plaintiff.

(d) Individual defendants, Melvin Lawrence, C. W. Eady, and J. E. Thornton, are underground employees of the plaintiff and members and officers of said Unit No. 8 who have selected said organization for their representative for collective bargaining.

(e) The defendants herein named are made parties defendant in their individual and representative capacities, as hereinabove set forth and described, under Rule 23 of Federal Rules of Civil Procedure, as representative of all of plaintiff's employees, as all of such employees represent a class that is so numerous as to make it impracticable to bring them all before the Court, and such individual defendants, representing as they do the employees and different groups thereof, so fairly represent all employees as to insure adequate representation of all, and are, therefore, sued because the right sought to be enforced by the plaintiff against all of the employees are several and there is a common question of law and fact affecting the several rights and common relief is sought against all.

Plaintiff has elected, in keeping with the statutes and rules of Court in such cases made and provided and more especially Rule 23, Rules of Civil Procedure, to make and name as parties herein the above named and described defendants as being typical of the several classes of plaintiff's said underground mine employees whose rights would be affected by the decision to be rendered herein, and plaintiff avers that said employees, selected

and named as defendants, properly and fairly represent all of said underground mine employees, and that said underground mine employees are all interested in and parties to the controversy hereinafterwards described.

The plaintiff invites the timely intervention in this action of any of its other employees who are not specifically or individually made defendants hereto to intervene or join herein as parties defendant, all to the end that the controversy herein set forth and shown may be fully and fairly determined by this Court in this proceeding.

The Administrator of the Wage & Hour Division, United States Department of Labor, as such Administrator, is interested in the construction (hereinafterwards prayed for) of Section 7 of the Act, commonly called the "Fair Labor Standards Act of 1938", and the plaintiff invites the timely intervention in this action of such Administrator.

## IV.

### Statement of Controversy.

Plaintiff alleges that there is an actual and bona fide controversy existing as of the date of filing this petition between the plaintiff on the one hand and the defendants herein named on the other hand, said controversy growing out of the following facts and being as herein stated:

Said controversy relates to the judicial construction of Section 7 of the Act, said section reading as follows:

"Section 7(a) 'No employer shall, except as otherwise provided in this section, employ any of his employees who are engaged in commerce or in the production of goods for commerce—

"(1) for a workweek longer than forty-four hours during the first year from the effective date of this section,

"(2) for a workweek longer than forty-two hours during the second year from such date, or

"(3) for a workweek longer than forty hours after the expiration of the second year from such date, unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed."

The plaintiff asserts:

1. That in working its employees in and about their actual working places eight hours per day for five days per week it is not employing said employees for a workweek longer than forty hours.

2. That no part of the time (unless some actual physical labor or service is during such time performed for the plaintiff) spent by its underground employees in the bath house or in going from and to the bath house to or from the portal, or to and from the underground manloading station from or to the portal, or to or from the actual working places of the employees from or to the underground manloading station, constitutes a part of the "workweek".

Otherwise stated, the plaintiff asserts that the Congress intended the word "workweek" to be construed as meaning the time actually spent by plaintiff's underground miners in or about their usual work, and did not intend to include a part of the "workweek" the time spent by such underground employees in being transported or walking to and from the places where they actually worked.

(3) That if the Congress did intend that traveling time of plaintiff's underground employees to and from the places where they actually worked should be considered as a part of the workweek, such legislation is violative of the Fifth Amendment to the Constitution of the United States.

Some of the defendants (being members of the International Union of Mine, Mill & Smelter Workers, affiliated with the C. I. O.) assert:

1. That the Congress intended to include within the meaning of the word "workweek" all the time from the moment the underground employees leave the bath house before the beginning of the day's work until the moment they enter the bath house at the end of the day's work.

Otherwise stated, that the entire time from the moment the underground employees leave the bath house before the beginning of the day's work until the moment they enter the bath house at the end of the day's work should be considered as a part of the "workweek", and that the underground employees should be paid for all such time and should be paid overtime for such portion of the "workweek", as thus defined, which exceeds forty hours since October 24, 1940, and forty-two hours from October 24, 1939, to October 24, 1940, and forty-four hours from October 24, 1938, to October 24, 1939.

Others of the defendants (being members of Unit No. 8, Brotherhood of Miners of Captive Ore Mines of Alabama), so plaintiff has been informed and believes, assert:

1. That the Congress intended to include within the meaning of the word "workweek" all the time from the moment the underground employees enter the bath house

before the beginning of the day's work until the moment they leave the bath house at the end of the day's work.

Otherwise stated, that the entire time from the moment the underground employees enter the bath house before the beginning of the day's work until the moment they leave the bath house at the end of the day's work should be considered as a part of the workweek, and that the miners should be paid for all such time, and should be paid overtime for such portion of the week's work, as thus defined, which exceeds forty hours since October 24, 1940, and forty-two hours from October 24, 1939, to October 24, 1940, and forty-four hours from October 24, 1938, to October 24, 1939.

The controversy involves a large sum of money because, if the assertions and contentions of the plaintiff are correct and its construction of the Act legal, it has paid to its underground employees all the compensation due them under the provisions of the Act. However, if the assertions and contentions of the underground employees are correct and their construction of the Act legal, plaintiff will be due its underground employees a large sum of money for overtime at a rate not less than one and one-half times the regular rate at which the underground employee was employed, which accrued indebtedness, if the estimates of the underground employees as to the amount of overtime is correct, will amount to approximately Two Hundred Fifty Thousand and No/100 ($250.00) Dollars, and if the plaintiff continues in the performance of its understanding and contention that only time actually spent by an underground employee working at and around the usual workplace constitutes the "workweek", the overtime and obligations of the plaintiff, therefore, will each day become increasingly larger. Without a determination of this controversy it is impossible for

plaintiff to know and ascertain whether or not it is violating the Act.

## V.

### The Opinion of the Administrator.

On March 23, 1941, the Administrator of the Wage and Hour Division, United States Department of Labor, announced a "Modified Portal to Portal Wage-Hour Opinion" and report, a complete copy of said opinion and report is hereto attached, marked Exhibit "A", and made a part hereof.

Plaintiff avers that said report was made on March 15, 1941, for release on Sunday, March 23, 1941, and said opinion was made on March 17, 1941, for release on Sunday, March 23, 1941; that promptly upon receiving information as to said opinion and report, plaintiff, with other employers like situated, filed with the Administrator its application for a reconsideration of said opinion; that a hearing on such application for reconsideration was held on Friday, March 28, 1941, before such Administrator; and that the petition for a reconsideration was taken under advisement. Plaintiff avers that on April 1, 1941, the Administrator denied the petitions for reconsideration but postponed the effective date from April 1, 1941, to May 1, 1941.

In said opinion the Administrator, in effect, expresses the opinion, and advises the plaintiff and other employers like situated, that the enforcement policy of the Division, effective May 1, 1941, will be that the workday in plaintiff's mines "starts when the miner reports for duty as required at or near the collar of the mine, and ends when he reaches the collar at the end of the shift".

Otherwise stated, it is the expressed opinion of the Administrator that the word "workweek" in said Act includes the entire portion of time spent by plaintiff's underground miners in going from the entrance or portal of the mine to the places where they actually work, and in returning from such places to said portal.

Plaintiff has been advised by counsel, and on such advice charges that the opinion expressed by the Administrator has no legal force; that the Administrator; under the provisions of the Act, has, and claims to have, no authority to judicially determine the legal effect of said provision of the Act; and that the opinion as thus expressed by the Administrator is erroneous and illegal. Said opinion is by no means a determining factor in this proceeding, but illustrates and emphasizes the bona fides of the controversy as herein set forth and the necessity for having said controversy fully, fairly, and promptly determined by this Court.

Said opinion serves as, and is claimed by defendants, to be, the principal support for their asserted construction of Section 7 of the Act.

There appears in said report (Exhibit "A") the following footnote:

"While the Wage and Hour Division Bulletins are not binding on the Courts, it may be anticipated that Judges will accord them especial weight; see United States v. American Trucking Associations, Inc., 310 U. S. 534. The Administrator has also from time to time issued statements concerning enforcement policy under which he proposes to proceed for reasons of administrative convenience." (Report, page 1, footnote 3.)

The institution and continuance in effect of the enforcement or threatened enforcement of said illegal and erroneous opinion of the Administrator subject the plaintiff to the peril of the heavy penalties of the Act.

In view of the foregoing, plaintiff, therefore, deems it material and relevant to make the following averments, which it asserts show or tend to show the illegality and incorrectness of the Administrator's opinion, and the lack of weight which should be accorded said opinion by this Court in declaring the issue of law herein sought to be declared.

Plaintiff avers that such averments where stated as facts are true, and where not stated as facts, plaintiff has been informed thereof, believes such information, and on such information and belief avers that they are true.

1. Plaintiff on information and believe alleges that prior to July 23, 1940, the Wage and Hour Division of the United States Department of Labor issued to the press the following release:

"First Mining Company Enjoined.

"The Cornucopia Gold Mines, a corporation with principal offices in Seattle, Washington, has been restrained from violations of the Fair Labor Standards Act, according to an announcement of the Wage and Hour Division, U. S. Department of Labor. This is the first Wage and Hour case in which judgment has been entered against a mining company. The corporation, operating a mine and mill near Cornucopia, Oregon, is engaged in the mining and concentrating of ore containing gold and silver.

"A judgment entered in the United States District Court for the Western District of Washington, Northern Division,

on May 3, provides for the payment of restitution. Approximately $18,000 in back wages for overtime worked is due some 283 employees.

"An important stipulation contained in the judgment is that time spent by employees in traveling from the 'portal', or entrance, of the mine to the 'face', or place where they work, and from the 'face' back to the 'portal' is to be deemed time worked. This means that hereafter the miners are assured of wages from the time they enter the mine until they leave it. Heretofore the miners were required to show only six hours of work on their time cards, although they were actually in the mine for eight hours. The mining company previously had not paid for the two hours consumed by the men riding into the tunnel in the mine property and going up or down the shafts to their place of work for the day."

That said release was printed in newspapers over the United States, including the newspapers of Birmingham, Alabama; and that the publication of said release was one of, if not the sole, motivating cause of the making by the defendant unions of the claims against the plaintiff for compensation to the underground miners for the time spent in going to and from their actual working places, and that (presented in flagrant violating of their written contract) these claims were the first insisted upon claims on the part of any underground employees for payment for time in going to and from their working places since mining became an industry in the State of Alabama.

The facts stated in said release above quoted were incorrect or incomplete. The true facts in reference to the Cornucopia case referred to in such release were that the employer, previous to the enactment of the Act, had

computed and paid wages on the "portal to portal" plan, and that following the enactment of the Act for the purpose of avoiding or coming within its terms, the employer began to compute and compensate its employees on the so-called "face to face" plan*, and charged as transportation time an arbitrary time set for transportation against the working time of all employees without reference to the time actually spent by such employees in being transported to and from their working places, thereby not counting as a part of the "workweek" the time spent in transportation, although previously it had been the custom to include such time as a part of the "workweek". That under these circumstances the decree referred to in the above released statement was entered *by consent* of the parties.

Upon the publication in the various papers of the country of the release of the Administrator above referred to in reference to such decision, there followed the claim of defendants, in accordance with the information thus incorrectly set out in such release, that transportation time should be included in their "workweek" for which they should receive compensation.

Plaintiff avers that, as hereinbefore and hereinafterwards set out more in detail, the situation in its mines in reference to prior custom, prior contracts, and the computation and payment of compensation was exactly the reverse from the facts that existed in the Cornucopia Gold Mine Company case.

2. Plaintiff alleges on information and belief that on or about Saturday, July 27, 1940, there was issued by

* Plaintiff uses the term "face to face" because of the fact that these terms have been used generally in describing plaintiff's method of operation. However, a more proper designation would be "working place to working place".

the United States Department of Labor, Wage and Hour Division, for release morning paper, Saturday, July 27, 1940, R-298, said release stating in substance that "two mining determinations were announced, one dealing with the status of lessees in mines and the other with working time in bituminous coal mines." In reference to the "determination" dealing with working time in bituminous coal mines, the release stated:

"Colonel Fleming announced that on the basis of an inquiry submitted by the bituminous coal mining industry, the Wage and Hour Division in carrying out its enforcement duties in that industry will accord great weight to any reasonable standards for determining working time which represent the prevailing customs and practices in the particular industry and are supported by a long history of *bona fide* collective bargaining agreements. In view of the circumstances described by the industry in submitting its inquiry, Colonel Fleming announced that practice of computing working time on a 'face to face' basis in the bituminous coal mining industry would not be unreasonable. Colonel Fleming explained the term 'face to face' to mean the productive work performed after the miner arrives at his usual working place, excluding the time spent in traveling from the portal or entrance of the mine to the place of work and the time spent in traveling from the portal or entrance of the mine to the place of work and the time spent in returning from the working place to the portal in the evening. The Administrator added that the determination in the bituminous coal mining industry should not be considered to apply to any mining operations where the traditional practice of computing hours worked differs from the custom in the bituminous coal mining industry."

3. Plaintiff alleges on information and belief that the Wage and Hour Division, United States Department of Labor, issued for release Wednesday, September 18, 1940, G-81, an address scheduled for delivery of Colonel Fleming (Philip B.), Administrator, Wage and Hour Division, United States Department of Labor, before the American Mining Congress, Colorado Springs, Colorado, Wednesday, September 18, 1940, and that in said address the Administrator stated, among other things:

"1. Must the time spent by the underground worker in traveling from the portal to the face be counted as time worked?

"2. Must time spent at lunch underground be considered as time worked?"

In reference to the matter herein involved, the Administrator, among other things, said:

"The portal-to-portal matter also has been presented to us by the bituminous coal mining industry. In response to inquiry I said that the Wage and Hour Division, in carrying out its enforcement duties in that industry, will accord great weight to any reasonable standards for determining working time which represent the prevailing customs and practices in the industry and are supported by a long history of *bona fide* collective bargaining agreements. In view of the circumstances described by the industry in submitting its inquiry, I announced that the practice of computing working time on a 'face-to-face' basis in bituminous coal mining would not be unreasonable. The term 'face-to-face' was explained to mean the productive work performed after the miner arrives at his usual working place, excluding the time spent in traveling from the portal or entrance of the mine to the

place of work, and the time spent in returning from the working place to the portal at the end of the shift. This determination in the bituminous coal mining industry should not be considered to apply to any mining operations where the traditional practice of computing hours worked differs from the custom in bituminous coal mining. In the Cornucopia case, for example, custom and tradition had long recognized the portal-to-portal basis of reckoning time worked.

"We are not yet disposed to take any particular position as to whether the half hour spent eating lunch underground may be deducted from hours worked. The problem is a very difficult one because the employee is required to eat under very unfavorable conditions and is subject to many of the hazards of his job while eating. On the other hand, we recognize that the employee does have time off in order to have lunch and an argument can be made that such time need not be considered as hours worked. But as I say, the Division is not prepared at the present time to make any definitive determination on this question."

4. Plaintiff alleges that at various times from July, 1940, until the middle of October, 1940, during which time the Wage and Hour Division of the United States Department of Labor had under investigation with full cooperation of the plaintiff the claims as presented by the unions that the underground miners were entitled under Section 7 of the Act to be compensated for the time spent in going to and from their work places, plaintiff was on several occasions informed by the representatives of the Administrator conducting or taking part in such investigations that in reaching a conclusion as to the claims of the unions the Department would accord great weight to the prevailing customs and practices as sup-

ported by the history of bona fide collective bargaining agreements.

5. Plaintiff alleges on information and belief that hearings were held in Salt Lake City, Utah, conducted by Harold Stein as the representative of the Administrator, on December 11 and 12, 1940; that said hearings related substantially, if not altogether, to the non-ferrous mines of the West and had no proper relationship either to the iron ore mines of plaintiff and of other operators in the State of Alabama or to the iron ore mines as constituting a national industry; that hearings were held in the City of Birmingham, Alabama, conducted by the said Harold Stein, on January 14 and 15, 1941; that said hearings related solely to the limestone mine and iron ore mines of the plaintiff, of the Tennessee Coal, Iron and Railroad Company, Sloss-Sheffield Steel & Iron Company, and Woodward Iron Company as operated in Jefferson County, State of Alabama; that the evidence and information given at such hearing established without dispute the fact that since mining has been an industry in Alabama, down to and including the present time, it has been the universal and unvarying custom in all underground mines (coal, iron, limestone, and all others) to compute and pay underground employees compensation on the basis of "working place to working place", and that there has never been computed or paid any compensation for the time spent in transportation or in going to and from the actual working places, and that all contracts, including those now in existence with organizations representing the employees, expressly provide for the computation and payment of underground employees on the basis of "working place to working place".

6. Plaintiff alleges that neither in the hearings at Salt Lake City, Utah, or Birmingham, Alabama, so far as

plaintiff has been able to acquire knowledge, was any evidence given or statements taken relating to any ore mines in any other portion of the United States other than the Birmingham District, although plaintiff, on information and belief, charges that the percentage of iron ore produced in the Birmingham District is less than ten (10) percent of the total production in the United States of America, and of the total production there has never been, except in a few mines (not more than one and one-half (1½) percent of the total, in states controlled by local statutes) in custom and practice the so-called "portal to portal" plan as sought to be instituted by the Administrator as representing his construction of Section 7 of the Act.

7. The plaintiff alleges that the opinion (Exhibit "A") is based upon the report (Exhibit "A") hereinafter referred to, and that said report contains the following averments:

"(1) *Face to face.* The miners are paid only for working time at the face and excluding lunch. Except where the shift was measured only by the work performed, this is probably the oldest method of computing the shift, but the record indicates that only a small percentage of underground metal miners are still paid on this basis. The only important group of mines now operating on a face to face basis are those in Alabama.

"(2) *Collar to collar.* Far more common than face to face in modern practice, and universal in the states of Utah and Arizona, where it is required by law, is the collar to collar basis. On this basis, the miner is paid for all time from the moment he descends from the surface to the moment he returns to the surface, except that in some mines the lunch period is not paid for.

Characteristically, though not invariably, the collar to collar shift is eight hours. Ordinarily lunch is eaten on the company's time, but a fixed lunch period is normal, nevertheless."

"* * * The great majority of metal miners nowaday work in mines where they are paid for part or all of their underground travel time."

The above factual statements are incorrect. There is not in the States of Alabama any appreciable production of gold, silver, copper, lead, and zinc (the metals for the most part referred to and covered by said report). The only ferrous mines in Alabama referred to and included in said report are the iron ore mines (although the coal mines and other mines in Alabama have always followed the same method of computing and paying wages as the iron ore mines follow). The method of mining and production of iron ore has no real similarity to that of the metals above referred to, the mining of which, so far as said report is concerned, is located principally in the Western States. The ore mines of Alabama do not in any way come in competition with said metal mines; and there is no practical, logical, or historical reason for considering the ore mines of Alabama in relation to or in connection with the metal mines above referred to.

The ore mining industry of the United States is one of tremendous size and importance. In the year 1940 there was produced in the United States a total of approximately 76 million tons of iron ore. Of this total amount approximately 63 million tons or 84.2% were produced by the mines located in what is known as the Lake Superior ore mining territory, approximately 7 million tons or 9.5% were produced by the ore mines of Alabama, approximately 3 million tons of 4.7% were produced by the iron

ore mines of New York, New Jersey, and Pennsylvania, and 1½ million tons or 1.6% were produced by the iron ore mines of Utah and Wyoming. Of the small amount produced in the Western states of Utah and Wyoming, approximately 90% thereof is produced in the State of Utah, which is controlled by a state statute requiring computation and payment of compensation on the so-called "portal to portal" basis.

Instead of, as recited in said report, the "greater majority of metal miners nowadays working in mines being paid for part or all of their underground travel time" and the "only important group of mines now operating on the 'face to face' basis are those located in Alabama", substantially all of the iron ore mines in the United States have always been, and are at the present time, operated upon and the compensation of their employees computed and paid on the "working place to working place" plan. In approximately 100% of the mines of the United States producing iron ore, there is not now and has never been in operation the so-called "collar to collar" plan. Even in the non-ferrous mines there has never been in existence, except in a negligible degree, the "portal to portal" plan.

Plaintiff avers that the basis for the opinion as given in the report and the reason therein assigned for applying the measuring rod of "face to face" to the bituminous coal mines of the United States and the measuring rod of "portal to portal" or "collar to collar" to the iron ore mines of the United States is not supported by the facts; that no real distinction can be made between the bituminous coal mining industry and the iron ore mining industry; and that the correct construction of Section 7 of the Act as applied not only to these industries, but to all other industries, is that the word "workweek"

was used by the Congress as meaning actual work at the usual working places, and it was not the intention of the Congress to include in the word "workweek" time spent by an employee in going to and from his place of work, during which time he is not in any way engaged in the performance of any physical labor or actual service for the employer.

## VI.

Necessity for the Relief of a Declaratory Judgment.

1. The Act contains, among others, the following provisions:

"Section 15:

"* * * it shall be unlawful for any person—

"(1) to transport, offer for transportation, ship, deliver, or sell in commerce, or to ship, deliver, or sell with knowledge that shipment or delivery or sale thereof in commerce is intended, any goods in the production of which any employee was employed in violation of section 6* (minimum wages) and section 7 (maximum hours), or in violation of any regulation or order of the Administration issued under Section 14 (relating to learners, apprentices, etc.) * * *;

"(2) to violate any of the provisions of Section 6 (minimum wages) and section 7 (maximum hours), or any of the provisions of any regulation or order of the Administrator issued under Section 14 (relating to learners, apprentices, etc.);

"(3) to discharge or in any other manner discriminate against any employee because such employee has filed

* Parenthesis and emphasis herein are ours.

any complaint or instituted or caused to be instituted any proceeding under or related to this Act, or has testified or is about to testify in any such proceeding, or has served or is about to serve on any industry committee;

"(4) to violate any of the provisions of Section 12 (prohibition against child labor);

"(5) to violate any of the provisions of Section 11(c) (relating to reports, etc.), or to make any statement, report, or record filed or kept pursuant to the provisions of such section or of any regulation or order thereunder, knowing such statement, report, or record to be false in a material respect.

"Section 16:

(a) Any person who willfully violates any of the provisions of Section 15 shall upon conviction thereof be subject to a fine of not more than $10,000, or to imprisonment for not more than six months, or both. No person shall be imprisoned under this subsection except for an offense committed after the conviction of such person for a prior offense under this subsection.

"(b) Any employer who violates the provisions of section 6 or section 7 of this act shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. Action to recover such liability may be maintained in any Court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated, or such employee or employees may designate an agent or representative to maintain such

action for and in behalf of all employees similarly situated. The Court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action."

As hereinbefore alleged, the plaintiff, under its assertion that "workweek" means time spent at the underground miners' usual working places, has, for several years prior to the enactment of the Act, employed, and now employs, its underground miners at their usual places of work forty hours per five-day week. It, therefore, follows that if the assertions and contentions of either the Administrator or of any class of plaintiff's underground mining employees are correct that plaintiff will be subject, among other things, first, to the penalties as set forth in section 16(a); second, to the unpaid overtime compensation and to an additional equal amount as liquidated damages and a reasonable fee to be paid to the attorneys of such underground employees who bring suits, together with the costs of the actions; and, third, to the costs, expenses, and inconvenience of a multiplicity of actions, depending upon how many of said underground mining employees of the plaintiff institute such legal proceedings.

2. *Threatened litigation:*

Plaintiff is in immediate peril of threatened litigation, because:

A. Defendant, Raimund Local 121, an unincorporated association affiliated with the International Union of Mine, Mill and Smelter Workers (a C. I. O. organization), on or about October 5, 1940, presented to the plaintiff a written officially adopted resolution and statement asserting

that the plaintiff had required its underground employees "to be on the premises on duty and in the performance of their work for the company ten hours per day, totaling fifty hours per 'workweek'" (the claim being based upon the alleged statement that two hours were spent on the premises of the plaintiff in time spent in the bath house or in transportation or walking to and from the working place, and demanding payment by the plaintiff of "all back time since the effective date" of the Act. A copy of said resolution is hereto attached, marked Exhibit "B", and made a part hereof.

B. Defendant, Raimund Local 121, an unincorporated association affiliated with the International Union of Mine, Mill and Smelter Workers (a C. I. O organization), by and through its duly constituted and authorized officers, and through its legal counsel, asserted and contended in the conference held by the Wage and Hour Division of the United States Department of Labor in Birmingham, Alabama, on January 14 and 15, 1941, that under the provisions and terms of the Act it was entitled to have counted as a part of the "workweek" of its members approximately two hours claimed to have been spent each workday from the moment they leave the bath house before the beginning of the day's work until the moment they enter the bath house at the end of the day's work.

C. Defendant officers and members and other members of said defendant, Raimund Local 121, an unincorporated association affiliated with the International Union of Mine, Mill and Smelter Workers (a C. I. O. organization), and defendants Jones, Pegues, and Allen have for several months past, and up to and including the time of the filing of this petition, made many and repeated statements and threats to institute and prosecute

suits against the plaintiff under the provisions of the Act for the purpose of enforcing the payment by plaintiff of overtime (claimed as above set forth) at the rate of one and one-half times the regular rate at which plaintiff's underground miners were employed, together with attorneys' fees and costs.

D. Plaintiff has been informed, believes such information, and on such information and belief charges that said defendant, Raimund Local 121, an unincorporated association affiliated with the International Union of Mine, Mill and Smelter Workers (a C. I. O. organization), has employed attorneys and authorized and directed them to proceed in the prompt bringing of such legal proceedings as may be necessary to enforce against the plaintiff their claim for such overtime payments, together with attorneys' fees and costs.

E. Defendant officers and members and other members of all of said defendant Local have for several months past and up to and including the date of the filing of this petition made many and repeated statements and threats to institute and prosecute suits against the plaintiff under the provisions of the Act for the purpose of enforcing the payment of the alleged overtime (claimed as above set forth) at the rate of one and one-half times the regular rate at which plaintiff's underground miners were employed, together with attorneys' fees and costs.

F. Plaintiff has been informed, believes such information, and on such information and belief charges that on Sunday, March 23, 1941, defendant Van D. Jones, Executive Board Member of District No. 5 of the International Union of Mine, Mill and Smelter Workers, and the principal administrative officer of the said Union in the State of Alabama, referring to the "portal to portal"

opinion of the Administrator, publicly announced in the press that the red ore miners of the Birmingham District, members of his union, would at once seek to recover a million dollars in back wages claimed to be due from the plaintiff and other operators of iron ore mines in Jefferson County, Alabama, and that approximately 6000 Alabama red ore miners would bring litigation for the purpose of enforcing the collection of the claimed amounts.

Wherefore, Plaintiff asserts that it is threatened with the immediate institution and prosecution of a multiplicity of suits involving large sums of money, and unless the declaration herein prayed for is granted, the plaintiff will be faced with great, if not irreparable, injury.

VII.

Probability of Great, If Not Irreparable, Injury.

If the declaratory judgment herein prayed for is not granted, the plaintiff is in immediate peril of suffering great and irreparable injury because (among other things):

1. Of the vexation, cost, and expense of a multiplicity of suits.

2. Of the delay in the settlement and determination of the controversy which will necessarily follow if the prompt remedy afforded by the Declaratory Judgment Act and Rule 57, Rules, District Courts of the United States, is not applied and the final determination of the legal question involved is left to the adjudication of such threatened suits, the bringing of which is immediately imminent;

3. Of the fact that, under the provisions of the Act, the threatened suits for overtime payments may be brought in different jurisdictions, in Federal Courts or in State Courts, and will be encumbered with the costs and expenses of such litigation and the delays incident to final determination and the changes of different adjudications by different jurisdictions;

4. Of the probability of cessation in work, and losses and damages and ill feelings by reason of labor disturbances, which will almost inevitably follow if the plaintiff fails to comply with the present illegal and erroneous opinion of the Administrator; or if in attempting to comply it is forced to insist on a reduction of the compensation now being paid its underground employees.

5. Of the great expense that the plaintiff will be put to in changing its operations from the "working place to working place" plan to the "portal to portal" plan, in the event, by reason of the Administrator's opinion and the perils of not complying therewith, it feels compelled to endeavor to comply therewith;

6. Of the claims of the different individual employees and the different classes of employees, being so different as to impose upon the plaintiff the perils and uncertainties incident to different contentions, and adjudications in reference to the legal issues herein sought to be declared.

## VIII.

### Perils of Decision.

Unless the plaintiff can obtain a prompt declaration on the issue of law here presented, it is confronted with

unusual and immeasurable perils of making a decision, because:

1. If it, under advice of counsel, decides to stand by its construction of the law, and the Court should ultimately decide that the assertions either of the Administrator or of individual employees or any of the classes of plaintiff's employees are correct, plaintiff would be subjected:

A. To the costs, expenses, and heavy penalties which would be imposed under Section 16(b) of the Act.

B. To the penalties of fine and imprisonment imposed by Section 16(a) of the Act.

C. To having the Administrator, under the warning given in his opinion of March 23, 1941 (Exhibit "A" hereto attached) proceed against it by injunction proceedings under Section 17 of the Act, and the prevention of the shipment in interstate commerce of its manufactured products.

2. If, on account of the perils incident to standing on its conviction under advice of counsel, it feels impelled on account of the uncertainties and delays of litigation to accept and comply with the opinion either of the Administrator, or with the demands and assertions of defendants, plaintiff will probably, and in many respects certainly, be subject to or have imposed upon it (among other things):

A. The payment of large sums of money to its employees for overtime as contended for by them.

B. The planning and institution of new methods of operation which will result in great loss and damages to the plaintiff because:

(a) compliance will result in a large reduction in production if the "portal to portal" plan should be put in effect and the underground employees could not remain underground more than eight hours per working day, which would mean that the time spent in going to and from the working places or from the bath house would have to be subtracted from the time now spent in actual work at the actual working places, thereby reducing the actual day's work time from eight hours to five hours or six hours, depending upon the correctness of the contentions of the various classes of employees.

(b) It would greatly increase plaintiff's cost per ton of ore produced.

(c) It would place the plaintiff at a serious disadvantage with its competitors and would deprive it of a substantial portion of its existing markets.

(d) As an illustration of the increased cost of which would fall upon the plaintiff, plaintiff has carefully calculated what the effect of putting the opinion of the Administrator into effect at its Raimund ore mines would be, and avers:

(1) Should the plaintiff continue to operate said mine on its present and long-existing custom and practice of five days per workweek (eight hours per workday), and continue to receive from its underground employees eight hours' actual work at their usual working places, and pay as overtime the approximate two hours consumed in going to and from the working places, the increased cost per ton of iron ore per ton would be twenty-seven cents.

(2) Should the plaintiff operate the mine four days per week instead of five days per week, it could comply with the opinion of the Administrator without exceeding forty hours per workweek. The increase of cost per ton, if this plan of operation should be put into effect in order to comply with the Administrator's opinion, would be twenty-three cents per ton of iron ore.

(3) Should the Company be able by changing its method of transportation by the purchase at large cost of additional equipment and by arranging a schedule of transportation so that each employee would have a definite time for entering and leaving the mine, the increase in cost would be large and the difficulties of operation great.

(e) Not only would the cost per ton of ore produced be greatly increased, but the percentage of loss in tonnage produced would be large, and the loss of production would not only be to the damage of the plaintiff but, by reason of the bonus which the underground mining employees receive upon the amount of their production, the loss of wages upon employees would be substantial.

(f) The plaintiff's cycle of operations, computation of wages, payment of wages, methods and forms of bookkeeping, rules and regulations governing employees, method and time of transportation, assembly and delivery of tools, powder, and equipment, and activities of service and surface crews have all been by long and unvaried custom, related to and based upon the "working place to working place" plan, and to change this method would be difficult and costly.

## IX.

Great Weight Should Be Accorded to Any Reasonable Standards Which Represent the Prevailing Custom

and Practice in the Particular Industry, and Which Are Supported By a Long History of Bona Fide Collective Bargaining Agreements.

The reasonableness of plaintiff's contention is supported by the following, among other, facts:

1. It has been for more than fifty years the unvarying and continuous custom in plaintiff's ore mines, as well as in all other ore mines in Alabama, for the wages of underground ore miners to be computed and paid on the "face to face" basis.

2. It has been for more than fifty years the unvarying and continuous custom in plaintiff's ore mines, as well as in all other ore mines in Alabama, that underground ore miners should not have their wages computed or paid for the necessary time in going from and to the surface and to and from their underground working places.

3. The same unvarying and continuous custom, as set forth in 1 and 2 above, has for more than fifty years existed in all underground coal mining operations of the plaintiff and of all other coal operators in the State of Alabama.

Plaintiff alleges that there can be, under conditions existing in the State of Alabama, no logical or possible differentiation between underground ore mines and underground coal mines, so far as the question under consideration is concerned.

4. The opinion (and enforcement thereunder) of the Administrator in reference to the bituminous coal mines is inconsistent with his opinion in reference to the iron ore mines.

5. The previous statement and interpretation of Section 7 of the Act by the Administrator are inconsistent with his present opinion in reference to the iron ore mines.

6. The laws of the State of Alabama during all of the period of time herein referred to have recognized in garnishment proceedings, wage suits, and other related matters that the payment and computation of wages in underground mines should be on the "face to face" basis.

## X.

## Petition and Prayer.

Wherefore, Plaintiff petitions and prays this Court to make and enter a decree and judgment declaring the rights of the respective parties hereto in the premises and more particularly plaintiff's rights as asserted in the following specific propositions:

### A.

Has the plaintiff, in following the work schedule and procedure as hereinbefore in Section II hereof set out, compiled with the provisions of Section 7 of the Act?

### B.

Did the Congress in the enactment of Section 7 of the Act intend that the "workweek" of plaintiff's underground employees should include any portion of their time spent in being transported or walking to and from their usual working places and while not engaged in any physical work or service for the plaintiff?

C.

Is the plaintiff indebted in any sums to its underground employees for the time spent by them at any time since the enactment of the Act and embracing (without any physical work or service for the plaintiff being done during such time)—

(a) Any time spent in the bath house;

(b) Any time spent in going from and to the bath house to and from the portal;

(c) Any time spent in being transported from and to the portal to and from the underground manloading station;

(d) Any time spent in walking to and from their usual working places from and to the underground manload station?

E.

What did the Congress intend in so far as the method of operation of plaintiff as hereinbefore in Section II hereof set forth are concerned by the use of the word "workweek"?

F.

Are the assertions of the plaintiff as herein set forth as to the intentions of Congress in the use of the word "workweek" legal and correct?

Premises Considered, Plaintiff petitions and prays that the Court adjudge and answer, separately and severally,

each of the questions and specifically set forth in the above paragraphs numbered A to F, both inclusive, and determine and declare that the plaintiff is not indebted to the defendants and its underground mining employees as compensation for any time spent by them since the enactment of the Act in the bathhouse or in going from and to the bathhouse to or from the portal or to and from the underground manloading station from or to the portal or to and from the actual working places of the employees from or to the underground manloading station (during which time said employees performed no physical labor or service in connection with their actual work), and that said defendants and their agents, representatives, and all underground employees of the plaintiff made parties defendant hereto as a class be restrained and enjoined from prosecuting any suit or claim of any nature whatsoever against plaintiff for any additional wages or compensation claimed to be due them under the terms and provisions of the said Act for any portion of their time spent as above set forth, and plaintiff prays for a general declaratory judgment with reference to the questions presented by this petition, and a judgment against the defendants for costs herein, and if the plaintiff be mistaken in the relief prayed for, plaintiff hereby prays for such other, further, more different or general relief as to the Court may seem meet, just, and proper, the premises considered.

Plaintiff prays that in accordance with rule 57, District Courts of the United States, the Court order a speedy hearing of this action and advance it on the docket.

XI.

Alternative Prayer.

If for any reason this Court should decline to take jurisdiction hereof under the provisions of the Federal

Declaratory Judgment Act (Section 1(g) hereof), plaintiff in the alternative prays that this Court assume, take, and exercise equity jurisdiction because of the existence of the facts herein alleged which confer upon said Court such equity jurisdiction in that it, separately and severally, appears therefrom that such jurisdiction should be exercised because:

(a) It is essential to the protection of the rights asserted by the plaintiff herein;

(b) It is essential to secure a determination of the question arising hereunder under a law regulating commerce;

(c) It is essential to the protection of the plaintiff from the costs, expense, inconvenience, and vexation of a multiplicity of suits;

(d) It is essential to protect the plaintiff against irreparable damage;

(e) It is essential to protect the plaintiff against the penalties of an Act of the Congress through an illegal and improper application of the provisions of such Act.

(f) It is essential to protect the rights of plaintiff on account of the inadequacy of any remedy at law:

(g) It is essential for the determination of plaintiff's assertion that the defendants are estopped by the terms of their written contract and by their conduct from asserting their claims for compensation for time in going to and from their places of work;

(h) It is essential to determine plaintiff's claim for and to grant plaintiff a specific performance of defendants' written contract.

Wherefore, Plaintiff prays that this Court will issue a temporary restraining order or preliminary injunction restraining and enjoining said defendants and their agents and representatives and all underground mine employees of the plaintiff made parties hereto as a class from instituting, maintaining, or prosecuting any other action or proceeding to determine the rights of this plaintiff or of the defendants under the averments of this bill of complaint, and that each of said defendants be required to propound and assert their respective rights, if any they have, to this Honorable Court; and plaintiff further prays, separately and severally, that on final decree it be ordered, adjudged, and decreed by the Court:

1. That plaintiff is not indebted to any of its underground mine employees in any sum under the provisions of the Fair Labor Standards Act of 1938;

2. That defendants are not entitled to recover from plaintiff any compensation under the provisions of the Fair Labor Standards Act of 1938;

3. That plaintiff is not indebted in any sums to any of its underground mine employees for the time spent by them at any time since the enactment of the Act and embracing (without any physical work or service for the plaintiff being done during such time)—

(a) Any time spent in the bathhouse;

(b) Any time spent in going from and to the bathhouse to and from the portal;

(c) Any time spent in being transported from and to the portal to and from the underground manloading station:

(d) Any time spent in walking to and from their usual working places from and to the underground man-loading station;

4. That defendants are estopped by their written contract and by their conduct from asserting any claim for or recovering any compensation for time spent in going to and from their place of work;

5. That plaintiff is entitled to the specific performance of the written contract between plaintiff and the defendants.

6. That plaintiff go hence with its reasonable costs herein incurred.

Plaintiff submits itself to the jurisdiction of the Court and offers to do full equity.

T. F. PATTON & BORDEN BURR
and
BENNERS, BURR, McKAMY & FORMAN,
Attorneys for Plaintiff.

Birmingham, Ala.

Verification.

State of Alabama,
Jefferson County.

Personally appeared before me, the undersigned authority in and for the above named State and County, N. E. Thompson who, being first duly sworn, on oath deposes and says that he is the Superintendent of Ore Mines of the Republic Steel Corporation, a corporation, named as

plaintiff in the foregoing petition, and as such Superintendent and agent is authorized to make this affidavit; that he has read over the facts therein set forth; that he is familiar with the facts as therein stated; and that said facts as therein stated are true except where stated on information and belief and where so stated he verily believes the same to be true.

N. E. THOMPSON.

Sworn to and subscribed before me this 3 day of April, 1941.

MARGARETTE KENNEDY,
Notary Public.

(Seal)

Filed April 4, 1941.

197 EXHIBIT A.

Exhibit A to the petition of the Republic Steel Corporation is a copy of the Opinion and Report of the Administrator of the Wage and Hour Division of the United States Department of Labor, marked "For Release Sunday, March 23, 1941," and is in all respects identical with Exhibit A to the petition of the Tennessee, Coal, Iron & Railroad Company, heretofore set out on page 76 of this transcript.

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198 EXHIBIT B.

Copy:

Bessemer, Alabama, October 12, 1940.

In Re: Raimund Local No. 121, of the International Union of Mine, Mill and Smelter Workers, District No. Five, an Affiliate of The Bessemer Smelters Council.

Whereas, there now exists a controversy between this Local and the Republic Iron & Steel Company, at its mines near Bessemer, Alabama, and this controversy is of long standing and deals with the travel pay of our members by the above mentioned Company at its iron ore mines in its production and maintenance departments; and these employees are required to report at the mouth or collar of the mines at 6 o'clock, A. M. in the morning for the purpose of being loaded into mantrips and other methods of entering the mines, they being underground workers; and at the mouth or collar of the mines are checked in at six o'clock and immediately given supplies, tools, equipment and instructions, and then they proceed to their working places, which is approximately 2 miles from the mouth or collar of the mines and down under the ground, which requires and consumes approximately one hour's time before they then arrive at their usual working places; all of this time being spent on the premises of the Company, and after the men are checked in and given supplies, equipment and instructions then they proceed to their working places to perform their usual tasks, after which they return to the mouth or collar of the mines arriving there about four o'clock in the afternoon, and are checked out, thus requiring the employees to be on the premises on duty and in the performance of their work for the company ten

(10) hours per day in the mines, totaling fifty hours per work week, and

Whereas, immediately after our Union was set up, and ever since that time, we have been protesting the travel pay of our members in this mine, and this controversy is based upon the time spent by our members on the premises of the Company each work week and being in excess of the hours required to work under the law, and as we understand it, in violation of the rules and law, and which time amounts to approximately 10 hours per workday, and employees affected by this condition numbering approximately 600. And we further believe that in view of the fact that the Fair Labor Standards Act was passed primarily for the purpose of reducing excessive required hours on the premises of the employer during any given work week, and

Whereas, the Fair Labor Standards Act is recognized and being complied with in many instances without any controversy on the part of the employers, but notwithstanding that fact and in the face of many rulings by the Wage & Hour Board supporting our position and conditions of work, we are still required by the said Company to be on the premises of the Company many hours in excess of the workweek, and for which we receive no pay.

Therefore: Be it Resolved by this Local in regular meeting assembled that we authorize and request our local and National officers to immediately bring about a correction of these conditions and require the Company to immediately comply with the Fair Labor Standards Act from now on, and also require the Company to pay all back time since the effective date of this law.

And we further authorize our officers to bring this Resolution to the attention of the Hon. Robert P. Amis, Regional Director of the Wage & Hour Division of the Department of Labor in Birmingham, Alabama, and also with Col. Philip B. Fleming, Administrator of the Wage & Hour Division of the Department of Labor, Washington, D. C. And our officers both local and National are further authorized to take such steps as may be necessary and expedient, by negotiations or suit, in order to bring about a speedy conclusion of this controversy.

Be it further resolved that copies of this Resolution be immediately forwarded to all interested parties.

This is to certify that the above is a true and exact copy of a Resolution unanimously adopted by Local No. ... in its regular meeting of October 12, 1940.

(S.) LOUIS TARRANT,
As President of Local #121 of
I. U. M. M. & S. W.

Attested by:
(S.) B. G. STEPHENS,
As Recording Secretary.
(Seal)
(I. U. M. M. & S. W.)
(Raimund Local #121)
(Bessemer, Ala.)

MOTION OF PETITIONER-PLAINTIFF REPUBLIC STEEL CORPORATION FOR A TEMPORARY RESTRAINING ORDER OR PRELIMINARY INJUNCTION.

201 (Civil Action No. 5234.)

Comes the plaintiff in the above entitled cause, and adopting the allegations of its bill of complaint as a part of this motion, moves the Court to issue herein a temporary restraining order or preliminary injunction restraining and enjoining said defendants and their agents, representatives, and all other underground employees of the plaintiff made parties defendant hereto as a class from prosecuting any suit or claim of any nature whatsoever against plaintiff for any additional wages or compensation claimed to be due them under the terms and provisions of the said Act for any portion of their time, including the lunch period, spent in being transported or going to and from their actual places of work, and that the terms of said injunction be as set forth in prayer of said bill of complaint.

BORDEN BURR
and
BENNERS, BURR, McKAMY & FORMAN,
Attorneys for Plaintiff.

Filed April 4, 1941.

ORDER SETTING MOTION OF PETITIONER-PLAINTIFF REPUBLIC STEEL CORPORATION FOR TEMPORARY RESTRAINING ORDER OR PRE-PRELIMINARY INJUNCTION OF HEARING.

202 (Civil Action No. 5234.)

This matter coming on to be heard on the motion and prayer of the plaintiff for the issuance of a temporary restraining order or preliminary injunction, it is ordered by the Court that said motion be, and the same hereby is, set for hearing in open Court on the 17th day of April, 1941, at 10 o'clock A. M.

It is further ordered that service of a copy of the bill of complaint herein, of said motion and of this order be made upon the defendants in accordance with Rule 5(b) of the Rules of Civil Procedure, and that such service be made not less than five (5) days before the time set for hearing.

This 4th day of April, 1941.

T. A. MURPHREE,
Judge.

Filed April 4, 1941.

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203 RETURN OF SERVICE OF PROCESS ON PETITION OF REPUBLIC STEEL CORPORATION, omitted from the printed record, pursuant to Rule 23 of this Court.

## TEMPORARY RESTRAINING ORDER.

204 Civil Action No. 5232.

This cause coming on to be heard on this the 12 day of April, 1941, on the application of certain of the defendants that the hearing heretofore set herein for April 17, 1941, on plaintiff's motion for a restraining order or preliminary injunction be continued, and said application being considered, it is ordered and decreed by the Court:

1. That said hearing previously set for April 17, 1941, be, and the same hereby is, continued;

2. That said cause be, and the same hereby is, set for hearing and for trial on the merits for Monday, June 23, 1941, at 10 o'clock A. M.;

3. That pending said hearing the status quo of said case shall be maintained and that said defendants and the underground employees of the plaintiff as set forth and described in the bill of complaint and their agents and representatives be, and they hereby are, temporarily restrained from instituting and prosecuting any suits in any Court relative to the matters and things in the bill of complaint set forth.

It is further ordered that attorneys for plaintiff be, and they hereby are, expressly authorized and directed to make service of this order upon defendants or their attorneys.

T. A. MURPHREE,
Judge.

Filed April 14, 1941.

On April 12, 1941, an identical order was entered and filed in Civil Action No. 5234—Republic Steel Corporation v. Raimund Local No. 121, et al., and on April 14, 1941, an identical order was entered and filed in Civil Action No. 5233—Sloss-Sheffield Steel & Iron Company v. Sloss Red Ore Local No. 109, et al.

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206 ORDER CONTINUING TEMPORARY RESTRAINING ORDER.

(Civil Actions Nos. 5232, 5233 & 5234.)

The temporary restraining order heretofore issued in the above entitled causes for good cause shown, is hereby continued in force and effect for ten days from the date hereof.

Dated this 24th day of April, 1941.

T. A. MURPHREE,
District Judge.

Filed April 24, 1941.

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207 ORDER CONTINUING TEMPORARY RESTRAINING ORDER.

(Civil Actions Nos. 5232, 5233 & 5234.)

The temporary restraining order heretofore issued in the above entitled causes for good cause shown, is hereby continued in force and effect for ten days from the date hereof.

Dated this 5th day of May, 1941.

T. A. MURPHREE,
District Judge.

Filed May 5, 1941.

208 ORDER CONTINUING TEMPORARY RESTRAINING ORDER.

(Civil Actions Nos. 5232, 5233, & 5234.)

The temporary restraining order heretofore issued in the above entitled causes for good cause shown, is hereby continued in force and effect for ten days from the date hereof.

Dated this 14th day of May, 1941.

T. A. MURPHREE,
District Judge.

Filed May 14, 1941.

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209 ANSWER OF DEFENDANTS AFFILIATED WITH AMERICAN FEDERATION OF LABOR.

(Civil Action No. 5232.)

Come the above named defendants and, for answer to the petition of complaint heretofore filed in this cause, say:

1.

Defendants admit the averments in Section I of said complaint as to allegations of jurisdiction of the Court.

2.

Defendants are without knowledge or information sufficient to form a belief as to the truth of the averments contained in Section II of said complaint.

3.

Defendants are without knowledge or information sufficient to form a belief as to the truth of the averments contained in Section III of said complaint.

4.

Defendants are without knowledge or information sufficient to form a belief as to the truth of the averments in Section IV of said complaint.

5.

Defendants are without knowledge or information sufficient to form a belief as to the truth of the averments in Section V of said complaint.

6.

Defendants deny the averments of Section VI of said complaint.

7.

Defendants deny the averments of Section VII of said complaint.

8.

Defendants deny the averments of Section VIII of said complaint.

9.

Defendants deny the averments of Section IX of said complaint.

10.

Defendants are without knowledge or information sufficient to form a belief as to the truth of said averments in Section X of said complaint.

11.

Defendants deny that petitioners are entitled to the relief prayed for in Sections XI and XII of said complaint.

12.

The petition or complaint fails to state a claim against defendants upon which relief can be granted.

Cross-Claim.

And defendants, hereinafter named, hereby present and file a cross-claim against the plaintiff, Tennessee Coal, Iron & Railroad Company, a corporation, and set forth the following facts, upon which said cross-claim is based:

First. That this cross-claim is made and asserted for and on behalf of all of the named defendants as set out in sub-paragraphs (e), (f), (g), (h), (i), (j) of Article or Section III of the complaint, and all persons who are represented by the said named persons, associations, and labor unions who are or have been employees of Tennessee Coal, Iron & Railroad Company in its iron ore mines in Jefferson County, Alabama, from to-wit: October 24, 1938, to and inclusive of April 30, 1941, and who are or were members of the named local unions affiliated with the American Federation of Labor, and all other employees of the plaintiff who are or were similarly situated, but who are not specifically referred to or made

tion for the contents thereof. Except as herein otherwise answered, the material allegations of fact contained in said section V of plaintiff's petition are denied. Intervener neither admits nor denies arguments, conclusions, characterizations, and statements other than material allegations of fact contained in section V of plaintiff's petition.

Intervener alleges that the proper interpretation of Section 7 of the Fair Labor Standards Act of 1938 is as set forth in the Opinion and Report, a copy of which is annexed to plaintiff's petition as Exhibit A.

VI.

For the terms of the Fair Labor Standards Act of 1938, mentioned in section VI of plaintiff's petition entitled "Necessity For the Relief of a Declaratory Judgment" intervener refers to the Act. Regarding any material allegations of fact in section VI of plaintiff's petition, intervener has no knowledge or information sufficient to form a belief. Intervener neither admits nor denies arguments, conclusions, characterizations, and statements other than material allegations of fact contained in said section VI of plaintiff's petition. Intervener denies that there is any necessity for relief by a declaratory judgment.

VII.

Intervener has no knowledge or information sufficient to form a belief regarding the truth of any material allegations of fact, in section VII of plaintiff's petition. Intervener neither admits nor denies arguments, conclusions, characterizations, and statements other than material allegations of fact contained in said section VII of plaintiff's petition.

VIII.

Intervener denies the material allegations of fact contained in section VIII of plaintiff's petition. Intervener neither admits nor denies arguments, conclusions, characterizations, and statements other than material allegations of fact contained in said section VIII of plaintiff's petition.

IX.

Intervener denies the material allegations of fact contained in section IX of plaintiff's petition. Intervener neither admits nor denies arguments, conclusions, characterizations, and statements other than material allegations of fact contained in said section IX of plaintiff's petition. Intervener alleges that the working conditions of employees in plaintiff's ore mines are set forth in section II of Exhibit A, annexed to plaintiff's petition. Intervener alleges that the terms of private contracts can not alter the proper interpretation of the terms of the Fair Labor Standards Act. Intervener alleges further that the terms of the contracts referred to in section IX of plaintiff's petition or any other contracts cannot relieve plaintiff of its obligations imposed by the Fair Labor Standards Act of 1938 and defendants can not waive by contract or otherwise the benefit of said Act.

X.

Intervener has no knowledge or information sufficient to form a belief respecting the allegations of paragraph X of plaintiff's petition.

Intervener alleges that the terms of private contracts can not alter the proper interpretation of the terms of the Fair Labor Standards Act. Intervener alleges further

that the terms of the contracts referred to in section IX of plaintiff's petition or any other contracts can not relieve plaintiff of its obligations imposed by the Fair Labor Standards Act of 1938 and defendants cannot waive by contract or otherwise the benefit of said Act. Intervener alleges further that defendants can not be estopped by the terms of the alleged contracts referred to in section X of plaintiff's petition or otherwise from claiming the benefits of the Fair Labor Standards Act.

Second Defense.

This Court has no jurisdiction over plaintiff's petition under the Federal Declaratory Judgments Act because there is no actual controversy within the meaning of the said Act, said petition does not present a case or controversy within the meaning of Article III, Section 2 of the United States Constitution, plaintiff is not threatened with or in danger of suffering any irreparable injury, plaintiff has a complete and adequate remedy at law with respect to any rights arising out of the matters alleged.

GERARD D. REILLY,
Solicitor of Labor.
IRVING J. LEVY,
Assistant Solicitor in Charge of Litigation.
JEROME A. COOPER,
Regional Attorney.
ABNER BRODIE,
United States Department of Labor.
Attorneys for Philip B. Fleming, Administrator of the Wage and Hour Division, United States Department of Labor.

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1007 Comer Building,
Birmingham, Alabama.
or
U. S. Department of Labor,
Washington, D. C.

Filed June 7, 1941.

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## ANSWER OF PHILIP B. FLEMING, ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR, INTERVENER.

281 Civil Action File No. 5234.

Philip B. Fleming, Administrator of the Wage and Hour Division, United States Department of Labor, as his pleading setting forth the claim or defense for which intervention is sought, respectfully shows that:

First Defense.

I.

Intervener neither admits nor denies the allegations of section I of plaintiff's petition but leaves plaintiff to its proof thereof.

II.

With respect to the allegations of section II of plaintiff's petition regarding the working conditions of plaintiff's employees at its ore mines, intervener alleges that their

working conditions are as set forth in section II, entitled "The Miner's Day," of the Opinion and Report which is annexed to the petition as Exhibit A. Except as herein otherwise stated, the intervener is without knowledge or information sufficient to form a belief respecting any other material allegations of section II of plaintiff's petition.

III.

Intervener has no knowledge or information sufficient to form a belief as to the truth of the allegations contained in section III of the petition entitled "The Defendants" except that intervener admits that the Administrator of the Wage and Hour Division, United States Department of Labor, is interested in the construction of Section 7 of the Fair Labor Standards Act of 1938, but not as prayed for in plaintiff's petition.

IV.

Intervener has no knowledge or information sufficient to form a belief as to the truth of the allegations contained in section IV of the petition entitled "Statement of Controversy." Intervener denies that the material allegations of fact contained in said section constitute an actual controversy within the meaning of the Federal Declaratory Judgments Act (26 U. S. C., Section 400), or otherwise. Intervener admits that Section 7 of the Fair Labor Standards Act is as stated in section IV of plaintiff's petition. Intervener alleges that there are differences of opinion respecting the interpretation of Section 7 of the Fair Labor Standards Act of 1938, which differences of opinion are described in section IV of Exhibit A, annexed to plaintiff's petition.

Intervener alleges that the proper interpretation of Section 7 of the Fair Labor Standards Act of 1938 is as

set forth in the Opinion and Report, a copy of which is annexed to plaintiff's petition as Exhibit A.

V.

Regarding the allegations contained in section V of plaintiff's petition entitled "The Opinion of the Administrator" intervener admits that an opinion and report in the form annexed to the petition and marked Exhibit A was issued. Further, to the extent that they are material or relevant, intervener refers to reports, releases, bulletins, and opinions of the Wage and Hour Division of the United States Department of Labor, mentioned in plaintiff's petition for the contents thereof. Except as herein otherwise answered, the material allegations of fact contained in said section V of plaintiff's petition are denied. Intervener neither admits nor denies arguments, conclusions, characterizations, and statements other than material allegations of fact contained in said section V of plaintiff's petition.

Intervener alleges that the proper interpretation of Section 7 of the Fair Labor Standards Act of 1938 is as set forth in the Opinion and Report, a copy of which is annexed to plaintiff's petition as Exhibit A.

VI.

For the terms of the Fair Labor Standards Act of 1938, mentioned in section VI of plaintiff's petition entitled "Necessity For the Relief of a Declaratory Judgment" intervener refers to the Act. Regarding any material allegations of fact in section VI of plaintiff's petition, intervener has no knowledge or information sufficient to form a belief. Intervener neither admits nor denies arguments, conclusions, characterizations, and statements other than material allegations of fact contained in said section

VI of plaintiff's petition. Intervener denies that there is any necessity for relief by a declaratory judgment.

VII.

Intervener has no knowledge or information sufficient to form a belief regarding the truth of any material allegations of fact in section VII of plaintiff's petition. Intervener neither admits nor denies arguments, conclusions, characterizations, and statements other than material allegations of fact contained in said section VII of plaintiff's petition.

VIII.

Intervener denies the material allegations of fact contained in section VIII of plaintiff's petition. Intervener neither admits nor denies arguments, conclusions, characterizations, and statements other than material allegations of fact contained in said section VIII of plaintiff's petition.

IX.

Intervener denies the material allegations of fact contained in section IX of plaintiff's petition. Intervener neither admits nor denies arguments, conclusions, characterizations, and statements other than material allegations of fact contained in said section IX of plaintiff's petition. Intervener alleges that the working conditions of employees in plaintiff's ore mines are set forth in section II of Exhibit A, annexed to plaintiff's petition.

Second Defense.

This Court has no jurisdiction over plaintiff's petition under the Federal Declaratory Judgment Act because

there is no actual controversy within the meaning of the said Act, said petition does not present a case or controversy within the meaning of Article III, Section 2 of the United States Constitution, plaintiff is not threatened with or in danger of suffering any irreparable injury, plaintiff has a complete and adequate remedy at law with respect to any rights arising out of the matters alleged.

GERARD D. REILLY,
Solicitor of Labor.
IRVING J. LEVY,
Assistant Solicitor in Charge of Litigation.
JEROME A. COOPER,
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United States Department of Labor.
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or
Wage and Hour Division,
U. S. Department of Labor,
Washington, D. C.

Filed June 7, 1940.

## CERTIFICATION TO ATTORNEY GENERAL.

285 . (Consolidated Civil Action No. 5232.)

To the Attorney General of the United States:

It is hereby certified that in the above entitled cause the constitutionality of an Act of Congress affecting the public interest, to-wit, the Fair Labor Standards Act of 1938, is drawn in question in this Court.

Done this 26th day of May, 1941.

T. A. MURPHREE,
United States District Judge.

Filed May 26, 1941.

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## 286 ORDER PERMITTING INTERVENTION.

(Civil Actions Nos. 5232, 5233 and 5234.)

This cause coming on to be heard on the petition of Philip B. Fleming, as Administrator of the Wage & Hour Division, United States Department of Labor, to be allowed to intervene as a party defendant herein and to file as such intervener an answer to the complaint, and said motion now being considered and all parties being represented by counsel, it is Ordered by the Court:

1. That said motion to intervene be and the same is hereby granted and the said Philip B. Fleming, as such Administrator, be hereafter considered as a party defendant herein as fully as if he had been made a party and jurisdiction had been acquired over him as such party in the beginning hereof.

2. That the motion of the said Philip B. Fleming, as such Administrator, to be allowed to file an answer, copy of which is attached to his motion to intervene, be and the same hereby is granted, subject, however, to the right of the plaintiff and the other defendants herein to file such amendments to the complaint or motions or other pleadings in answer or in response to such answer of such Administrator as they may be advised, such amendments, motions, or pleadings to be filed within ten (10) days from the date of this order.

3. It is further Ordered that the pre-trial agreement and the pre-trial order as previously made herein and all other orders previously made herein shall be in all respects binding upon the said Philip B. Fleming, as such Administrator and party defendant hereto.

Dated this 7th day of June, 1941.

T. A. MURPHREE,
United States District Judge.

Filed June 11, 1941. Chas. B. Crow, Clerk, U. S. Dist. Court.

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MOTION OF PHILIP B. FLEMING, ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR, AS INTERVENER, FOR MODIFICATION OF ORDER PERMITTING INTERVENTION AND FOR CONTINUANCE.

287 (Civil Actions Nos. 5232, 5233 and 5234.)

Philip B. Fleming, Administrator of the Wage and Hour Division, United States Department of Labor, (hereinafter referred to as intervener), moves the Court as follows:

1. To amend and modify the Court's order dated June 7, 1941, by which intervener was permitted to intervene

in this action, so as to permit intervener to intervene in this action as a party unconditionally, because the amending of a party's pleading as provided in said order is not relevant or properly before the Court upon a motion to intervene and is not foreclosed by the allowance of such a motion.

2. To amend and modify the Court's order dated June 7, 1941, by which intervener was permitted to intervene in this action, so as to permit intervener to intervene in this action as a party unconditionally, because the representation of intervener's interests by the original parties is inadequate, and intervener, directly and solely responsible for the Administration of the Fair Labor Standards Act of 1938, should neither be bound by orders issued prior to his intervention against or on behalf of private litigants nor be bound by pre-trial agreements entered into prior to his intervention by such private litigants.

3. To continue this action because intervener is afforded inadequate time between the date of the order permitting him to intervene in this action (June 7, 1941) and the date set for trial of this action (June 23, 1941) in which to obtain answers to necessary interrogatories and to take depositions of important witnesses, each of whom is out of the State of Alabama at a greater distance than 100 miles from the place of trial.

4. To continue this action because intervener is afforded inadequate time between the date of said order permitting him to intervene in this action and the said date set for trial in which to prepare for trial of the important issues raised by the pleadings.

5. To continue this action because between the said date intervener was permitted to become a party to this

action and the said date set for trial, there will not elapse the normal period of sixty days permitted the United States or an officer or agency thereof to answer to a complaint or claim.

6. To continue this action for a reasonable time for the reasons set out above or in lieu thereof to enter an order permitting intervener (a) to take, within a reasonable period subsequent to the trial of this action, depositions of important witnesses, each of whom is out of the State of Alabama at a greater distance than 100 miles from the place of trial, and (b) to use such depositions as if taken prior to trial.

GERARD D. REILLY,
Solicitor of Labor.
IRVING J. LEVY,
Assistant Solicitor in Charge of Litigation.
JEROME A. COOPER,
Regional Attorney.
ABNER BRODIE,
United States Department of Labor.
Attorneys for Philip B. Fleming, Administrator of the Wage and Hour Division, United States Department of Labor.

Post Office Address:
Wage and Hour Division,
U. S. Department of Labor,
1007 Comer Building,
Birmingham, Alabama.
or
Wage and Hour Division,
U. S. Department of Labor,
Washington, D. C.

Notice of hearing on motion of Philip B. Fleming, as Intervener, for Modification of Order permitting Intervention and for Continuance, omitted from the printed record, pursuant to Rule 23 of this Court.

* * * * * * * * * *

Served by mailing a copy of the foregoing to Benners, Burr, McKamy & Forman, Attorneys for Plaintiff, Birmingham, Alabama; a copy to Crampton Harris, Esquire, Attorney for Muscoda Local No. 123, et als, Defendants, copy to Messrs. J. Q. Smith, Ralph W. Quinn, and W. F. Spencer, Attorneys for Muscoda Local No. 21935, et als, Defendants, Birmingham, Alabama, this 10th day of June, 1941.

JEROME A. COOPER.

Filed June 10, 1941.

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OBJECTIONS OF PLAINTIFFS TO INTERVENER'S MOTION FOR MODIFICATION OF ORDER PERMITTING INTERVENTION AND FOR CONTINUANCE.

290 (Civil Actions Nos. 5232, 5233 and 5234.)

Now come, separately and severally, the plaintiffs in the above styled cause, and object to the granting of the motion to continue this action, and to amend and modify the Court's order date June 7, 1941, by which Intervener was permitted to intervene in this action, and move the Court to overrule and deny said motion, separately and severally, as to each of its averments and as grounds for such objection and such motion to overrule, state:

1. That Intervener was without any absolute legal right to become a party defendant herein, and that the Court

had the right and it was the duty of the Court to impose such conditions upon the intervention being allowed as it thought proper and just, and the conditions which the Court imposed were proper and just.

2. It affirmatively appears that the only interest which this Intervener had or can have in said action is to attempt to sustain the legality of his opinion referred to in the complaint as "Modified Portal to Portal Wage and Hour Opinion"; that the Administrator began his investigation and research in reference to said matter, as shown by the statements in said opinion, many months previous to March 15, 1941, the date of his rendition of said opinion; that the Administrator has been giving attention to and investigating said matter for approximately one year prior to the rendition of the opinion, and had, so plaintiffs aver, been giving consideration to the legal question involved since the effective date of the Act and that, therefore, the Administrator has had much more time and much greater opportunity to become familiar with all facts relating to this matter than has plaintiffs or any one else; that the opinion which the Administrator seeks to sustain by his intervention was rendered on or about March 15, 1941, the opinion being made effective, in accordance with its original release, on April 1, 1941, and on April 1, 1941, after reconsideration on petition of plaintiffs and others, the opinion was reaffirmed and its effective date postponed to May 1, 1941; that the complaints in this case were filed on, to-wit, April 3, 1941, and copies thereof promptly furnished the Administrator; that the Administrator was invited, in said complaints, to become a party defendant herein, which invitation was not accepted or any intimation of its acceptance previously given until the filing of the motion for intervention; that the Administrator appeared by counsel and requested the continuance of the hearing set herein on the motion of plaintiffs for restraining orders or preliminary injunctions; that the Administra-

tor was present in person and by counsel at the hearing herein upon the motions of some of the defendants for a dismissal of the complaints herein, and was present either in person or by counsel during the settlement of the pleadings herein; that the Administrator was advised of the order setting down this case for pre-trial hearing, and if not advised of the results of such hearing and the order of the Court made thereof, has had full opportunity to be so advised; that the Administrator has been thoroughly advised and informed of all proceedings which have taken place in this case since the filing of the complaints herein; that both the Court and the Administrator and the other parties were advised at the time of the filing of the complaints; and subsequent thereto, of the importance to the plaintiffs of an early settlement of this case, and of the fact that under the rules of the Court an action for declaratory judgment has a preferred status and may be, at the discretion of the Court, set at the head of the docket; that the Court (the Administrator having full knowledge and information thereof), recognizing the importance of the case and the justness of an early disposition, arranged its docket, secured assistance from other Judges and with the consent, or without the objection of any parties, including the Administrator, who had full knowledge thereof, set the case for trial on the merits on June 23, 1941, said order setting the case having been made with the knowledge of the Administrator on, to-wit, the .... day of April, 1941; that plaintiffs have prepared the case for trial, have arranged for the attendance of witnesses from outside the subpoena jurisdiction of the Court, and have undergrone heavy expenses for trial preparation; that plaintiffs and the original defendants herein on pre-trial hearing have co-operated in making agreements in reference to the production of a large amount of documentary evidence and other evidence without primary proof of authenticity, etc.; that unless the Administrator is bound by such pre-trial agreements the trial of this

case at the time set will be at the mercy of an intervener who, under the circumstances above set forth, belatedly accepted the invitation previously extended, to become a party hereto; that the position which the Administrator now seeks to maintain by his intervention and answer is identical with the one now assumed and taken by all the other defendants, and such position is being and will be adequately presented by able and distinguished counsel who have appeared and will appear in behalf of the original defendants; that unless the intervener had seen fit to intervene herein he would not have been bound in any way by any of the judgments or decrees of this Court, and that having voluntarily sought to become a party hereto, he should not be allowed, when accepting the grace of the plaintiffs and of the Court, to do so without submitting to the fair and just conditions heretofore made in the order of intervention; that if, with the full information and knowledge that intervener has at all times had, he does not wish to be bound by the previous orders of the Court or does not think that counsel representing the original defendants are sufficiently able and adequate to present his position, then intervener could have and should have remained outside the jurisdiction of this Court in this case, and should not now be allowed to come in and take charge of the case.

Plaintiffs further aver that the filing of this motion was the first intimation received by plaintiffs that intervener desired to obtain answers to interrogatories and take depositions of important witnesses. Plaintiffs aver, as aforesaid, that they have arranged for the presence at the trial of this case of a number of witnesses living outside the subpoena jurisdiction of the Court, and that they expect to take the depositions of other witnesses; that they have also prepared interrogatories to the intervener which they expect to file, and to ask the Court for an order requiring prompt answers to be made thereto; that while

the intervener has not the right under the circumstances stated above to ask for any consideration in reference to the taking of depositions or answerings of interrogatories, plaintiffs herein express a willingness to cooperate in the answering of interrogatories which may be presented to them and which are legally and properly answerable, and in taking of the depositions of any witnesses whose depositions intervener desires to take, and while they are exceedingly busy with the preparation of their own case, they will so arrange that on reasonable notice, not less than five days, of the time and place of the taking of depositions, together with the giving of the names of the witnesses and summaries indicative of what they are expected to be interrogated about, such depositions may be taken without further notice in order that they may be available for introduction on the trial hereof.

Plaintiffs object to the entering of any order permitting intervener or any other party to take evidence or depositions subsequent to the trial of the case.

Now, having fully answered the motion of intervener, and, separately and severally, each paragraph thereof, plaintiffs move that the same be overruled and dismissed at the cost of intervener.

BORDEN BURR,
E. L. ALL & S. M. BRONAUGH,
Attorneys for Plaintiffs Herein.

Address: Birmingham, Alabama.

I, S. M. Bronaugh, of counsel for the plaintiffs, hereby certify that I have served a copy of the foregoing on Mr. Jerome A. Cooper, Attorney for Intervener, on this the 13th day of June, 1941.

S. M. BRONAUGH.

Filed June 13, 1941.

## INTERROGATORIES PROPOUNDED BY PLAINTIFFS TO PHILIP B. FLEMING, ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR.

295 (Civil Actions Nos. 5232, 5233 and 5234.)

Now come, separately and severally, Tennessee Coal, Iron & Railroad Company, a corporation, plaintiff, Sloss-Sheffield Steel & Iron Company, a corporation, plaintiff, and Republic Steel Corporation, a corporation, plaintiff, and pursuant to Rule 33 of Rules for Civil Procedure of the District Court of the United States, propounds to Philip B. Fleming, Administrator of the Wage and Hour Division, United States Department of Labor, the following separate and several written interrogatories:

Interrogatory I.

A. State when you were:

(a) Appointed;

(b) Qualified, and

(c) Began to serve as Administrator of the Wage and Hour Division of the United States Department of Labor.

B. State whether or not you are the Administrator duly appointed under Section 204 of the Fair Labor Standard Act of 1938 (hereinafter referred to as the Act.)

C. State when you, under your appointment, took the direction of the Wage and Hour Division created in the Department of Labor pursuant to the terms of the Act.

D. State whether or not when and since you assumed the direction of the Wage and Hour Division in the De-

partment of Labor all the employees in said Division became and have remained until the present time under your supervision and direction.

E. State whether or not when and since you assumed the direction of the Wage and Hour Division in the Department of Labor all the papers, files and records of the Wage and Hour Division in the Department of Labor became and have remained,

(a) In your custody or control, or

(b) Subject to your direction and control.

F. Give the name or names of the person or persons who served as Administrator of the Wage and Hour Division previous to the time you began your service, and state whether or not, so far as you know, all the papers, files and records of the Wage and Hour Division as administered by the previous Administrator or Administrators were turned over to you and have since such time been, and now are, in your custody or under your direction and control as Administrator.

G. State whether or not, as Administrator of the Wage and Hour Division of the Department of Labor, you have access to the papers and files of the Department of Labor which are in other departments thereof.

H. State whether or not you can, as such Administrator, on request, secure access to the papers, files or records of the Department of Labor other than the Wage and Hour Division thereof.

I. State whether or not the heads of other departments of the Department of Labor other than the Wage and Hour Division will, at your request, allow you to have

the originals or copies of any papers in their files which are relevant to the issues in this case.

J. State whether or not you are willing to request from the heads of other departments of the Department of Labor other than the Wage and Hour Division the originals or copies of any papers, files or records which are or may become relevant and material to the issues in this case.

Interrogatory II.

Will you please examine the paper attached to the complaint in Civil Action File 5232, in which the Tennessee Coal, Iron & Railroad Company, a corporation, is petitioner and plaintiff, and which is marked Exhibit "A" and made a part of the complaint?

A. Is such Exhibit "A" a complete and correct copy of an opinion rendered by you as Administrator of the Wage and Hour Division, designed "R-1315 (revised)", for release on Sunday, March 23, 1941, and of a report designated "G-131", which was attached to such opinion for release on Sunday, March 23, 1941?

B. If such Exhibit "A" is not a correct and complete copy of such opinion and such report attach to your answer to this interrogatory a correct and complete copy of such opinion and report.

C. Please refer to the original report as made by Mr. Stein and state in reference to such report:

(a) When it was signed;

(b) When it was made;

(c) When it first reached you and was read by you.

D. Is the report attached as a part of Exhibit "A" in any way different from the report as it was when it first reached you and was read by you? If there were any differences attach hereto, appropriately identified, a correct copy of the report as originally made.

E. Please refer to the original opinion made or signed by you with reference to the matter in issue here and state:

(a) When the opinion was first written;

(b) By whom it was written;

(c) What part you took in its writing;

(d) When it was signed by you;

(e) When it was released by you to the press.

F. Has it been and is it now customary in the Wage and Hour Division of the United States Department of Labor for opinions and reports to be prepared for release to the press in mimeographed form and for distribution to the public generally?

G. Is Exhibit "A" a correct copy of the opinion and report for release on Sunday, March 23, 1941, and was it given out for release in accordance with the custom and practice asked about in the immediately previous question?

H. The announcement of the "Modified Portal to Portal Wage and Hour Opinion" bears the designation "R-1315 (revised)".

Please state what this designation signifies.

Was it a revision of a previous release? If so, state in reference to the previous release:

(a) When it was made;

(b) By whom it was prepared;

(c) By whom it was released;

(d) In what respects, if any, it differed from the revised release.

(e) Of what does the revision consist?

I. Did you prepare, render or sign more than one opinion? If so, answer the questions propounded in Section H of this interrogatory with reference to each of the opinions which you so prepared, rendered or signed.

J. What was the occasion for revising the opinion, and if you have not already done so, state in what respects the opinion was revised.

K. Did Mr. Stein make more than one report to you? If he made any report that was in any way different from the report as set forth as a part of Exhibit "A" to the complaint, attach to your answers to these interrogatories, appropriately identified, a correct copy of each such other and different report or reports.

L. If you have not already done so, give the date you first saw any report made by Mr. Stein, and the dates you first saw any subsequent reports made by him; the date that you first prepared or signed or issued any opinion based on any of said reports, and if you have not already done so, state whether or not any opinion that you signed, made or issued differed in any respect from the opinion

as set forth in Exhibit "A", and if there were any differences attach to your answer to these interrogatories, appropriately identified, copy or copies of such opinion or opinions in which such differences appeared.

M. Did any person or persons other than Mr. Stein make any written report or reports to you in reference to this matter and which were considered by you in making your opinion? If so, attach to your answer to this interrogatory correct copy or copies of such report or reports.

N. State whether or not the opinion which you finally rendered in this case is correctly stated and set forth in Exhibit "A". State whether or not that is your opinion as Administrator at the time of the answering of these interrogatories. State whether or not it is your purpose in administering the Act to follow such opinion unless the same is judicially declared to be incorrect.

O. State whether or not the opinion that you made was based upon the report made by Mr. Stein.

P. State whether or not in rendering your opinion you did so in reliance upon the truth and correctness of the factual statements contained in Mr. Stein's report.

Q. Did you read the testimony and record of the hearings held in Salt Lake City, Utah, and Birmingham, Alabama, on December 11-12, 1940, and January 14-15, 1941, respectively?

Interrogatory III.

A. In reference to the Mr. Stein referred to in the announcement of your "Modified Portal to Portal Wage and Hour Opinion" state:

(a) His full name;

(b) His age;

(c) The character and extent of his education, giving the names of schools and colleges that he attended, and the dates of such attendance;

(d) The positions held by him with any governmental departments, giving the dates of such holdings, and a brief description of the duties required on him in each such position;

(e) The positions of private employment held by him with any corporations or persons, giving the names and addresses of such corporations or persons and dates of such holdings.

B. State whether Mr. Stein has ever at any time had any connection with any persons or corporations or businesses engaged in the business of mining or producing iron ore.

C. If you have answered the immediately preceding question in the affirmative, set forth the dates and character of such connections and the names of the persons or corporations with whom such connections were had.

D. State fully the extent and character of his practical experience, if any, in connection with the business of mining iron ore, coal, gold, silver and other minerals.

Interrogatory IV.

A. It is stated in Exhibit "A" to the complaint in Civil Action File 5232 wherein the Tennessee Coal, Iron and Railroad Company is plaintiff, that "an investigation

was conducted including field surveys and questionnaires, reports by the Division's Regional Directors, and public conferences before Mr. Stein at Salt Lake City December 11-12, 1940, and Birmingham, January 14-15, 1941," and that "many supplemental statements and briefs were also filed by employers, their associations and by unions."

In reference to this statement, please answer:

(a) Are these papers still in your position or under your direction and control?

B. Give a list and description of the field surveys referred to in said above quoted statements, having such list show by whom the field surveys were made, when they were made and where they were made. Attach copies thereof to your answers to these interrogatories appropriately identifying the same.

C. Give a list and description of the questionnaires referred to in said statement, having such list shown by whom the questionnaires were made, when they were made and where they were made. Attach copies thereof to your answers to these interrogatories, appropriately identifying the same.

D. Give a list and description of the reports by the Division's Regional Directors referred to in said statement, having such list show by whom such reports were made, when they were made and where they were made, and attach copies thereof to your answers to these interrogatories, appropriately identifying the same.

E. Give a list and description of the supplemental statements and briefs filed by employers, their associations and unions referred to in said statement, having such list show by whom such supplemental statements and briefs

were made or filed. Attach copies thereof to your answers to these interrogatories, appropriately identifying the same.

F. State whether or not any public conferences were held by Mr. Stein or any one else for the Wage and Hour Division in reference to this matter other than the ones held at Salt Lake City December 11-12, 1940, and Birmingham, January 14-15, 1941.

G. Give the name and location of each and all iron ore mines in the United States which:

(a) Came under your investigation in this matter,

(b) Were actually seen or inspected by Mr. Stein or any of your other investigators or employees (giving the names of such investigators or employees),

(c) Answered questionnaires sent out by you or any of your employees,

(d). Were in any other way included in your investigation and research of this matter (giving a brief description of the way in which they were so investigated).

H. If you have not already done so, state whether or not such investigation or research included the underground iron ore mines of the following states, the question being asked separately and severally as to each of said states: Alabama, Minnesota, Michigan, Wisconsin, Wyoming, Tennessee, Kentucky, Pennsylvania, Missouri, New York, Colorado, and such other states as produce iron ore.

I. If you have not already done so, state whether or not such investigation or research included the strip or open pit iron ore mining operations of the following states,

the question being asked separately and severally as to each of said states: Alabama, Minnesota, Michigan, Wisconsin, Wyoming, Tennessee, Kentucky, Pennsylvania, Missouri, New York, Colorado, and such other states as produce iron ore.

J. Were any mines included in your research or investigation other than underground mines?

K. Did you include in your research and investigation mines producing both ferrous and non-ferrous products?

L. Did you include in your research and investigation all products of any kind or character whether iron ore, gold, copper, silver, zinc, limestone, etc., provided such products were produced in underground operations?

L. (1) Did you include in your research and investigation any of the underground coal mines of the United States. If so, give a list of such mines and their locations.

L. (2) Have you, since your opinion was rendered, sent representatives into the Lake Superior District. If so, state when and give the names of these representatives.

M. Did your research and investigation disclose the existence of any competition between the iron ore mines of the plaintiffs in these suits and the underground mines in various sections of the United States which produce, gold, silver, zinc, copper, limestone and any other products other than iron ore?

N. If you have answered the immediately preceding question in the affirmative state fully and in detail the nature and character and extent of such competition, and give the names of all the mines which your investigation

disclosed were or are engaged in competitive business with the iron ore mines of these plaintiffs.

Interrogatory V.

A. Please refer to that portion of the complaint in cause number 5232 wherein the Tennessee Coal, Iron & Railroad Company is plaintiff, which sets out under the title "First Mining Company Enjoined," what purports to be a release issued by the Wage and Hour Division in reference to the case of the Cornucopia Gold Mines, and in reference to this release and its contents state:

(a) Was such release made by the Wage and Hour Division and under the authority of its Administrator?

(b) Is the release as so made correctly copied in the complaint?

(c) Was such release given to the newspapers and the public generally, and if it was not so distributed, state how and to what extent it was distributed?

(d) Was such release printed in newspapers over the United States?

(e) Was such release printed in the newspapers of Birmingham, Alabama?

B. State whether or not the following is a true statement of the true facts in relation to the Cornucopia Gold case:

That the employer, "previous to the enactment of the Act, had computed and paid wages on the 'portal to portal' plan, and that following the enactment of the Act for the purpose of avoiding or coming within its terms, the em-

ployer began to compute and compensate its employees on the so-called 'face to face' plan, and charged as transportation time an arbitrarily set time for transportation against the working time of all employees without reference to the time actually spent by such employees in being transported to and from their working places, thereby not counting as a part of the 'workweek' the time spent in transportation, although previously it had been the custom to include such time as a part of the 'workweek'. That under these circumstances the decree referred to in the above released statements was entered by consent of the parties."

C. If the facts in reference to the Cornucopia case are not correctly stated above, state in what respect or respects the statement is incorrect.

D. Please refer to that portion of plaintiff's complaint in cause number 5232 wherein the Tennessee Coal, Iron & Railroad Company is plaintiff which sets out what purports to be a copy of a release by the Wage and Hour Division for release morning papers, Saturday, July 27, 1940, R-928, and state whether or not:

(a) Such announcement and release was made by the Administrator or by his authority.

(b) Whether or not the release, as so made, is correctly set forth and copied in the complaint, and if it is claimed that it is not correctly set forth and copied, point out fully and in detail in what respect or respects it is not a correct copy of such release.

E. Please attach a copy of this release to your answers to these interrogatories, appropriately identifying the same.

F. Please refer to that portion of plaintiff's complaint in cause number 5232 wherein the Tennessee Coal, Iron & Railroad Company is plaintiff which sets out what purports to be a copy of a release by the Wage and Hour Division for release Wednesday, September 18, 1940, G-81, an address scheduled for delivery by Colonel Philip B. Fleming, Administrator, Wage and Hour Division, United States Department of Labor, before the American Mining Congress, Colorado Springs, Colorado, Wednesday, September 18, 1940, and state whether or not:

(a) Such announcement and release was made by the Administrator or by his authority,

(b) Whether or not the release, as so made, is correctly set forth and copied in the complaint, and if it is claimed that it is not correctly set forth and copied, point out fully and in detail in what respect or respects it is not a correct copy of such release.

G. Please attach a copy of this release to your answers to these interrogatories, appropriately identifying the same.

H. Please state whether or not a short time ago you wrote a letter to the Editor of the Engineering and Mining Journal, said letter beginning with the words: "The Editor of the Engineering and Mining Journal has asked me to reconcile, if I can, the statements I made in my speech before the American Mining Congress on September 18, 1940, with my recent approval of an examiner's report announcing our opinion that in effect hours worked in underground metal mining include all hours spent portal to portal minus the lunch period."

I. If you have answered the immediately preceding question in the affirmative, state whether or not the letter

which you wrote was correctly printed in the April, 1941, edition of the Engineering and Mining Journal, Volume 142, Number 4 thereof, and if it was not correctly printed, will you be good enough to attach a correct copy of the letter above referred to to your answers to these interrogatories, properly identifying the same?

J. Will you please attach a correct copy of the Bulletin referred to in Mr. Stein's report, Exhibit "A" to Plaintiff's complaint, as Interpretative Bulletin Number 12, properly identifying same?

K. Please state whether or not you or any other employee or representative of the Wage and Hour Division have at any time issued any interpretative bulletins, or any written opinions, or written replies to questions propounded by any person or persons asking the opinion or interpretation of you or of the Wage and Hour Division as to any questions relating to traveling time or transportation to and from places to work.

L. If you have answered the immediately preceding question in the affirmative attach hereto correct copies of all such interpretative bulletins, opinions and correspondence, properly identifying the same.

M. Have you in your files and in your possession or under your direction and control the following documents and papers:

(a) Claims or complaints presented by any of the defendants herein or members of any of the defendant unions herein against any of the plaintiffs in this cause in which the claim was made that such complainants or employees of any of these plaintiffs were entitled to be compensated under section 7 of the Act for their traveling or transportation time to and from their working places?

(b) The reports of any employees of the Wage and Hour Division covering or relating to investigations made of such complaints.

(c) Affidavits filed with the Wage and Hour Division by representatives of any of these plaintiffs in answer to or relating to the claims of their employees referred to above.

N. Have you in your files and in your possession or under your direction and control the following documents or papers:

(a) A letter or opinion dated approximately October 28, 1938, from the Comptroller General of the United States to the Secretary of Labor of the United States referring to the schedule of the government owned ferred operated between San Francisco and Angels Island, and expressing the opinion that the travel time spent by such inspectors was not properly included within "hours worked" within the meaning of the Act?

(b) Carbon copy or copies, or other copy or copies of the reply or replies of the Secretary of Labor to the above described letter or opinion.

(c) A letter or opinion dated approximately October 9, 1939, from the Comptroller General of the United States to the Secretary of Labor of the United States referring to the schedule of the government owned ferry operated between San Francisco and Angels Island, and expressing the opinion that the travel time spent by such inspectors was not properly included within "hours worked" within the meaning of the Act.

(d) Carbon copy or copies, or other copy or copies of the reply or replies of the Secretary of Labor to the above described letter or opinion.

(e) Copies of letters that passed between the Comptroller General of the United States and the Attorney General of the United States referring to the same matter as set forth in subdivisions (a) and (c) of Division I of Interrogatory V above, particularly copies of letters from the Comptroller General to the Attorney General and from the Attorney General to the Comptroller General, said letters bearing the approximate dates between August 20, 1940, and November 41, 1940.

(f) The file of papers containing originals and copies of all correspondence that passed between the Secretary of Labor, the Comptroller General, and the Attorney General referring and relating to the schedule of the Government owned ferry operating between San Francisco and Angels Island, and to the traveling time spent by government inspectors or other government employees in traveling to and from Angels Island.

(g) Please attach to your answers to these interrogatories such correspondence, files, letters, opinions, etc., as you have stated in answer to subdivisions (a), (b), (c), (d), (e) and (f) of Division I of Interrogatory V you have in your possession or under your direction and control, or true and correct copies thereof, appropriately identifying the same.

Interrogatory VI.

A. If you have in your possession or under your control or direction any other releases, reports or opinions issued by you or under your direction in reference to the question as to whether or not Section 7 of the Act requires computing as a part of the workweek any portion of the time spent in traveling to and from the actual working place other than the opinion set forth in Exhibit "A" to the complaint and other than the releases and statements set

forth in the complaint in case 5332 wherein Tennessee Coal, Iron & Railroad Company is plaintiff, attach full and complete copies of such other releases, reports or opinions to your answers to these interrogatories, properly identifying the same.

B. Is it not true that the first time you ever gave a definite opinion in reference to this matter was at the time you gave or authorized the giving of the opinion as set forth in Exhibit "A" to the complaint in cause number 5232 herein?

C. State whether or not prior to such time the matter covered by your opinion was one of uncertainty and without any definite announcement of any conviction or opinion on the part of the Administrator. If this is not true state fully and in detail in what respect it is not true.

D. State the first time that the question as expressed in your opinion set forth as Exhibit "A" to the complaint was first presented for the consideration of the Administrator.

E. Is it not true that from the time of the enactment of the Act until the issuance and release of the opinion as set forth in Exhibit "A" to the complaint operators of mines, including the plaintiffs or some of the plaintiffs in this case, were assured by you or by your representatives that the question as to whether or not the time spent in traveling to and from the places of work should be considered as part of the workweek was one of uncertainty and that in determining this question the Administrator would give great weight to the prevailing customs and practices in the industry, and to the history of bona fide collective bargaining agreements?

F. If you deny that your position is correctly stated in the immediately preceding interrogatory, state fully and in detail in what respect you claim it is incorrectly stated.

G. State whether or not the announcement that the Divisions would not seek to compel payment or restitution from mine owners who have been operating on a face to face basis, or other basis inconsistent with the principles outlined in Mr. Stein's report, was not due, as stated in the announcement, to the fact that the Division had not previously taken a definite stand on the problem involved.

Interrogatory VII.

A. Please refer to Paragraph 4 of Section V of the complaint in cause number 5232 wherein Tennessee Coal, Iron & Railroad Company is plaintiff and state whether or not the averments contained in said paragraph are true, and if you state that they are untrue, answer fully and in detail in what respect or respects you claim they are untrue.

B. Please refer to Paragraph 5 of Section V of the complaint in cause number 5232 wherein Tennessee Coal, Iron & Railroad Company is plaintiff and state whether or not the averments contained in said paragraph are true, and if you state that they are untrue, answer fully and in detail in what respect or respects you claim they are untrue.

C. Please refer to Paragraph 7 of Section V of the complaint in cause number 5232 wherein Tennessee Coal, Iron & Railroad Company is plaintiff and state whether or not the averments contained in said paragraph are true, and if you state that they are untrue, answer fully

and in detail in what respect or respects you claim they are untrue.

D. Please refer to Paragraph 6 of Section V of the complaint in cause number 5232 wherein Tennessee Coal, Iron & Railroad Company is plaintiff and state whether or not it is true that in your investigation of this matter any evidence was ever given or statements made relating to any iron ore mines in any portion of the United States other than the Birmingham District.

If you claim that any evidence was given or statements made relating to any other iron ore mines in any other portion of the United States other than the Birmingham District, state:

(a) The location of the mines that such evidence or statements related to; and

(b) A description of the evidence given or statements taken;

(c) By whom, and in what form all such evidence and statements were given, and the occasion or circumstances under which given.

Interrogatory VIII.

A. State whether or not statistical and ecomonic studies have been made by the Bureau of Labor Statistics in the Economic Section of the Wage and Hour Division in relation to the production of the United States in underground mines of iron ore separate and apart from the production of any other mining products.

B. If you have answered the immediately preceding questions in the affirmative attach to your answers to

these interrogatories, properly identified, summary copies of such statistical and economic studies.

C. State whether or not statistical and economic studies have been made by the Bureau of Labor Statistics in the Economic Section of the Wage and Hour Division in relation to the production of the United States in stripping or open pit operations of iron ore separate and apart from the production of any other materials.

D. If you have answered the immediately preceding question in the affirmative attach to your answers to these interrogatories, properly identified, summary copies of such statistical and economic studies.

E. State whether or not any investigations made by the Wage and Hour Division took into consideration competitive inter-relationships and or the convertability of operations normally carried on in underground iron ore mining operations as contrasted with either the st.. ping or open pit operations producing iron ore, or the underground operations of mines producing gold, silver, zinc, copper or products other than iron ore.

F. State whether or not the Wage Hour Division or any of its employees ascertained, or whether, within your knowledge, there exists as a fact any competitive inter-relationships between the underground iron ore mining operations of plaintiffs in the State of Alabama and the underground operations in other parts of the United States producing gold, silver, zinc, copper or products other than iron ore.

G. If you have stated that there are such competitive inter-relationships set forth fully and in detail.

(a) What such competitive inter-relationships are;

(b) The basis for your conclusion that such competitive inter-relationships actually exist.

H. State whether or not your investigation disclosed that there existed substantial differences in the methods of underground iron ore mining operations of different sections of the United States as contrasted with such underground iron ore mining operations in other sections of the United States.

I. If you have answered the immediately preceding question in the affirmative, are such differences substantial or insubstantial,—little or great?

J. State whether or not your investigation disclosed that the length of time used by underground mining employees in traveling from and to the portal of the mine to their usual working places varies in different mines in the same locality, and also varies in different mines located in various parts of the United States?

K. Are the differences inquired about in the immediately preceding interrogatory substantial or insubstantial,—great or small?

L. Is it not a fact that the difference of the length of time spent by the underground mining employees in traveling to and from the portal of the mine from and to their usual working places varies, according to your research and investigation, in different underground mining operations in different sections of the United States from as small a time as a comparatively few minutes to as long a time as two hours?

M. If the immediately preceding question does not correctly state the range of differences which your investigation and research ascertained, state the minimum length

of time that your investigation so disclosed, and give the name and location of the underground mine in which such minimum was disclosed; also the maximium length of time that your investigation disclosed, and given the name and location of the underground mine in which such maximum was disclosed.

N. If you state in answer to the two immediately preceding questions that you do not know, state whether or not you have had conducted any investigation, or made any research, for the purpose of determining (1) whether or not such travel time varies in such different mining operations, and (2) if so, the extent of such variations.

O. If you have caused such investigation, and made such research, describe the same fully, and if in written form attach copies to your answers hereto, and appropriately identify the same.

Interrogatory IX.

A. State whether or not you, as Administrator of the Wage and Hour Division of the Department of Labor, have in your possession and custody or under your control any papers, documents and correspondence relating to the question whether or not the time or any portion of the time spent by employees in underground coal mines in the United States of America in traveling to and from the usual working places should be computed as part of the workweek, and particularly correspondence between representatives of the coal operators, the United Mine Workers of America and the Administrator of the Wage and Hour Division, or any of them, or with the Wage and Hour Division in reference to such matter, including the opinion rendered by the Administrator in connection with such matter and the papers and documents upon which such opinion is based.

B. If you state you have such papers, documents and correspondence, or any of them, state which of them you have, describing such papers.

C. Attach copies of all such papers, documents and correspondence to your answers to this interrogatory, appropriately identifying the same.

BORDEN BURR,
E. L. ALL,
Attorneys for Plaintiffs. Tennessee Coal, Iron & Railroad Company, Sloss-Sheffield Steel & Iron Company and Republic Steel Corporation whose addresses are Birmingham, Ala.

I, Borden Burr, of counsel for the plaintiffs in the above styled cause, do hereby certify that I have served a copy of the foregoing interrogatories on Jerome A. Cooper, attorney for Philip B. Fleming, Administrator, Wage and Hour Division, United States Department of Labor, on this the 16 day of June, 1941.

BORDEN BURR.

Filed June 16, 1941.

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MOTION TO REQUIRE DEFENDANT PHILIP B. FLEMING, ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR, TO PRODUCE CERTAIN DOCUMENTS.

317 —(Civil Action Files Nos. 5232, 5233, 5234.)

Plaintiffs, separately and severally, move the Court for an order required the defendant Philip B. Fleming, as

Administrator of the Wage and Hour Division, United States Department of Labor, to produce and to permit plaintiffs to inspect and to copy each of the following documents:

A. Field surveys made by the defendant or by the Wage and Hour Division of the United States Department of Labor, or by its employees referred to in the opinion (Exhibit "A" to complaint of Tennessee Coal, Iron & Railroad Company) as being in part the basis for his "Modified Portal to Portal Wage Hour Opinion."

B. Questionnaires received by the defendant Fleming or by the Wage and Hour Division of the United States Department of Labor, or by its employees, referred to in the opinion as being in part the basis for his "Modified Portal to Portal Wage Hour Opinion."

C. Reports by the Regional Directors of the Wage and Hour Division, to the Administrator of the Wage and Hour Division, United States Department of Labor, referred to in the opinion as being in part the basis for his "Modified Portal to Portal Wage Hour Opinion".

D. Supplementary statements filed by employers or their associations with the Administrator of the Wage and Hour Division, United States Department of Labor, referred to in the opinion as being in part the basis for his "Modified Portal to Portal Wage and Hour Opinion."

E. Supplementary statements filed by unions with Administrator of the Wage and Hour Division, United States Department of Labor, referred to in the opinion as being in part the basis for his "Modified Portal to Portal Wage Hour Opinion".

F. The reports on "hours worked" in underground metal mining made by Harold Stein, Examiner, signed at Washington, D. C., on March 15, 1941.

G. Opinions signed, made or issued by this defendant as Administrator, referred to as "Modified Portal to Portal Wage Hour Opinions".

H. The ruling of the defendant, as Administrator, made on April 1, 1941, denying plaintiffs' petitions for reconsideration of the "Modified Portal to Portal Wage Hour Opinion," and postponing the effective date of such opinion from April 1, 1941, to May 1, 1941.

I. The files and documents in the office of the Wage and Hour Division of the United States Department of Labor relating to the case known as the Cornucopia Gold Mines Case, and referred to under the release of said Department entitled "First Mining Company Enjoined."

J. A report made to the Administrator of the Wage and Hour Division of the Department of Labor during the fall or winter of 1940 by Robert T. Amis, Regional Director of the Wages and Hour Division at Birmingham, Alabama, and particularly the report in reference to the investigation made by one Burk or Burks, an employe of the Wage and Hour Division, operating out of said Regional Director's office in Birmingham, Alabama, and detailing or referring to the results of his investigations of the conditions in the mines of the plaintiffs herein in relation to the claim made by certain of their employees that Section 7 of the Act had been violated.

K. The files relating to the question of whether or not the time or any portion of the time spent by employees in underground coal mines in the United States of America in traveling to and from the usual working places

should be computed as a part of the workweek, and particularly the correspondence that occurred between representatives of the coal operators and of the United Mine Workers of America and the Administrator of the Wage and Hour Division, or the Wage and Hour Division in reference to such matters, and particularly the opinion rendered by the Administrator in connection with such matter, and particularly all the papers and documents upon which such opinion was based.

L. The stenographic report of the proceedings held before the Administrator of the Wage and Hour Division, United States Department of Labor, in the City of Washington, D. C., on the hearing of the petition filed by these plaintiffs for reconsideration of the Administrator's "Modified Portal to Portal Wage Hour Opinion".

M. The address delivered by the defendant as Administrator of the Wage and Hour Division before the American Mining Congress at Colorado Springs, Colorado, on Wednesday, September 18, 1940.

N. The complaints filed by the defendants herein or by the defendant unions or any of their officers or representatives for the benefit of or on behalf of plaintiffs' employees.

O. A letter or opinion dated approximately October 28, 1938, from the Comptroller General to the Secretary of Labor referring to the schedule of the government owned ferry operating between San Francisco and Angel Island, and expressing the opinion that the traveling time spent by such inspections was not properly included within "hours worked" within the meaning of the Act.

P. Carbon copies or other copies of the reply or replies of the Secretary of Labor to the above described letter or opinion.

Q. A letter or opinion dated approximately October 9, 1939, from the Comptroller General to the Secretary of Labor referring to the schedule of the government owned ferry operating between San Francisco and Angel Island, and expressing the opinion that the traveling time spent by such inspectors was not properly included within "hours worked" within the meaning of the Act.

R. Carbon copies or other copies of the reply or replies of the Secretary of Labor to the above described letter or opinion.

S. Copies of letters that passed between the Comptroller General of the United States, and the Attorney General of the United States, referring to the same matter as set forth in "O" above, particularly copies of letters from the Comptroller General to the Attorney General, and from the Attorney General to the Comptroller General, said letters bearing the approximate dates between August 20, 1940, and November 4, 1940.

T. The file of papers containing originals and copies of all correspondence that passed between the Secretary of Labor, the Comptroller General and the Attorney General, referring and relating to the schedule of the government owned ferry operating between San Francisco and Angel Island, and to the traveling time spent by government inspectors or other government employees in traveling to and from Angel Island.

Defendant Fleming as Administrator as aforesaid, has possession, custody or control of each of the foregoing documents; each of them constitutes or contains evidence relevant or material to the matters involved in this cause; each of them is relevant to the question as to the weight which should be accorded by the Court to the "Modified Portal to Portal Wage Hour Opinion"; said documents

can be inspected without any great inconvenience to the defendant, and their inspection and the right to copy the same or such portions thereof as plaintiffs desire to copy are of importance to the proper and fair presentation of plaintiffs' case.

Plaintiffs submit themselves to such conditions and requirements as the Court may make in reference to the inspection and copying of such documents.

BORDEN BURR,
E. L. ALL,
BRADLEY, BALDWIN, ALL & WHITE,
BENNERS, BURR, McKAMY & FORMAN,
Attorneys for Plaintiffs.

Address: Birmingham, Alabama.

State of Alabama,
County of Jefferson.

Before the undersigned authority personally appeared Borden Burr, who being first duly sworn deposes and says that he is of counsel for the plaintiffs herein and authorized to make this affidavit; that in reference to all the facts contained in the foregoing motion be has received information from trustworthy and reliable sources, and based upon such information and belief deposes that the facts therein stated are true.

BORDEN BURR.

Subscribed and sworn to before me this 16 day of June, 1941.

MARGARET KENNEDY,
(Seal) Notary Public.

The above motion will be brought to the attention of the Court on Thursday, June 19, 1941, at 10:00 A. M.

BORDEN BURR.

CERTIFICATE OF SERVICE.

I, Borden Burr, of counsel for plaintiffs herein, hereby certify that I have served a copy of the foregoing motion upon Mr. Jerome A. Cooper, Attorney for Philip B. Fleming, Administrator of the Wage and Hour Division, United States Department of Labor, on this the 16 day of June, 1941.

BORDEN BURR.

Filed June 16, 1941.

ORDER CONTINUING TRIAL OF CASE FROM JUNE 23, 1941 TO JULY 8, 1941.

323 (Civil Actions Nos. 5232, 5233 and 5234.)

At the request of defendants related to the C. I. O. defendants and on motion of Phillip B. Fleming, Administrator of the Wage and Hour Division, and with the consent of the other parties in the above cases, It Is Ordered By the Court that said cases, which have previously been set for trial on June 23, 1941, be, and the same hereby are, passed and set for trial at 10:00 o'clock A. M., on July 8, 1941.

Done this 18th day of June, 1941.

T. A. MURPHREE,
Judge.

Filed June 18, 1941.

## MOTION TO DISMISS COUNTER CLAIM OF AMERICAN FEDERATION OF LABOR, ET AL.

324 (Civil Actions Nos. 5232, 5233, and 5234.)

Come the plaintiffs, separately and severally, and move the Court as follows:

I.

To dismiss the counterclaim filed by the defendant American Federation of Labor, and separately the counterclaim filed by each defendant affiliated with the American Federation of Labor, because said counterclaim does not present a cause of action which can properly or legally be interposed as a counterclaim to the cause of action as set out in the complaint.

II.

To dismiss the counterclaim filed by the defendant American Federation of Labor, and separately the counterclaim filed by each defendant affiliated with the American Federation of Labor, because the cause of action as set forth in the complaint is not such a cause of action to which a counterclaim of the nature of said counterclaim can be legally or properly interposed.

III.

To dismiss the counterclaim filed by the defendant American Federation of Labor, and separately and counterclaim filed by each defendant affiliated with the American Federation of Labor, because said counterclaim fails to state a claim against plaintiffs upon which relief can be granted.

IV.

To dismiss the counterclaim filed by the defendant American Federation of Labor, and separately the counterclaim filed by each defendant affiliated with the American Federation of Labor, because said counterclaim fails to state a claim against plaintiffs upon which relief can be granted on account of the following, stated separately and severally:

(a) It does not sufficiently appear who the persons in whose favor the counterclaim is sought to be asserted are;

(b) It does not sufficiently appear in what amounts it is claimed that the plaintiff is indebted to the person or persons in whose favor said counterclaim is asserted;

(c) It affirmatively appears from the allegations of the complaint that the plaintiff could not be indebted to said persons or persons in whose favor said counterclaim is sought to be asserted;

(d) The facts and details of the alleged counterclaim sought to be asserted are not sufficiently set forth nor described.

V.

To dismiss the counterclaim filed by the defendant American Federation of Labor, and separately the counterclaim filed by each defendant affiliated with the American Federation of Labor, because it affirmatively appears that the only issue in this case legally or properly before the Court is the sole question as to whether or not the declaratory judgment should be had as prayed for, and, upon the declaration of the Court in reference to the ques-

tion submitted for a declaratory judgment, the question of whether or not the plaintiffs are indebted in any sum to the person or persons in whose favor such counterclaim is asserted should be properly left open for settlement or appropriate litigation.

E. L. ALL,
BORDEN BURR,
Attorneys for plaintiffs separately and severally, whose addresses are Birmingham, Alabama.

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Notice of hearing on motion of pltfs., to dismiss Counter-Claim of defts., American Federation of Labor, et al., omitted from the printed record, pursuant to Rule 23 of this Court.

* * * * * * *

I hereby certify that a copy of all of the foregoing motion has been this day served upon defendant American Federation of Labor, and each defendant affiliated with the American Federation of Labor, by handing it to J. Q. Smith, one of the attorneys of record for said defendant.

This 19 day of June, 1941.

BORDEN BURR,

Filed June 19, 1941.

## MOTION TO DISMISS COUNTERCLAIM OF INTERNATIONAL UNION OF MINE, MILL AND SMELTER WORKERS, ET AL.

327 (Civil Actions Nos. 5232, 5233 and 5234.)

Come the plaintiffs, separately and severally, and move the Court as follows:

I.

To dismiss the counterclaim filed by the defendant International Union of Mine, Mill and Smelter Workers, and separately the counterclaim filed by each defendant affiliated with the International Union of Mine, Mill and Smelter Workers, because said counterclaim does not present a cause of action which can properly or legally be interposed as a counterclaim to the cause of action as set out in the complaint.

II.

To dismiss the counterclaim filed by the defendant International Union of Mine, Mill and Smelter Workers, and separately the counterclaim filed by each defendant affiliated with the International Union of Mine, Mill and Smelter Workers, because the cause of action as set forth in the complaint is not such a cause of action to which a counterclaim of the nature of said counterclaim can be legally or properly interposed.

III.

To dismiss the counterclaim filed by the defendant International Union of Mine, Mill and Smelter Workers, and separately the counterclaim filed by each defendant affiliated with the International Union of Mine, Mill and

Smelter Workers, because said counterclaim fails to state a claim against plaintiffs upon which relief can be granted.

IV.

To dismiss the counterclaim filed by the defendant International Union of Mine, Mill and Smelter Workers, and separately the counterclaim filed by each defendant affiliated with the International Union of Mine, Mill and Smelter Workers, because said counterclaim fails to state a claim against plaintiffs upon which relief can be granted on account of the following, stated separately and severally:

(a) It does not sufficiently appear who the persons in whose favor the counterclaim is sought to be asserted are;

(b) It does not sufficiently appear in what amounts it is claimed that the plaintiff is indebted to the person or persons in whose favor said counterclaim is asserted;

(c) It affirmatively appears from the allegations of the complaint that the plaintiff could not be indebted to said person or persons in whose favor said counterclaim is sought to be asserted;

(d) The facts and details of the alleged counterclaim sought to be asserted are not sufficiently set forth nor described.

V.

To dismiss the counterclaim filed by the defendant International Union of Mine, Mill and Smelter Workers, and separately the counterclaim filed by each defendant affiliated with the International Union of Mine, Mill and Smelter Workers, because it affirmatively appears that

the only issue in this case legally or properly before the Court is the sole question as to whether or not the declaratory judgment should be had as prayed for, and, upon the declaration of the Court in reference to the question submitted for a declaratory judgment, the question of whether or not the plaintiffs are indebted in any sum to the person or persons in whose favor such counterclaim is asserted should be properly left open for settlement or appropriate litigation.

E. L. ALL,
BORDEN BURR,
Attorneys for plaintiffs, separately and severally, whose addresses are Birmingham, Alabama.

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Notice of hearing on Motion of Pltfs., to dismiss Counter-Claim of deft., International Union of Mine, Mill & Smelter Workers, et al., omitted from the printed record, pursuant to Rule 23 of this Court.

* * * * * * *

I hereby certify that a copy of all of the foregoing motion has been this day served upon defendant, International Union of Mine, Mill and Smelter Workers, and each defendant affiliated with International Union of Mine Mill and Smelter Workers, by mailing it to J. A. Lipscomb, one of the attorneys of record for said defendants.

This 19 day of June, 1941.

BORDEN BURR.

Filed June 19, 1941.

330 AMENDMENT TO COMPLAINTS.

(Civil Actions Nos. 5232, 5233 and 5234.)

Come the plaintiffs, separately and severally, and amend their complaints heretofore filed in said causes (said amendment being made necessary by the intervention of Philip B. Fleming, Administrator of the Wage and Hour Division, United States Department of Labor, as Defendant) as follows:

XIII.

Plaintiffs re-adopt and re-affirm, so far as applicable to Philip B. Fleming, as Administrator of the Wage and Hour Division, United States Department of Labor, each and every allegation contained in the original complaints from the beginning to the end thereof.

XIV.

Plaintiffs re-adopt and re-affirm, so far as applicable to defendant Philip B. Fleming, as Administrator of the Wage and Hour Division, United States Department of Labor, all the averments and petitions and prayers contained in the petition and prayer of their respective complaints and add thereto the following:

A. Wherefore, plaintiffs petition and pray this Court to make and enter a decree and judgment declaring the rights of the respective parties, namely, the plaintiffs herein, and the defendant, Philip B. Fleming, ad Administrator of the Wage and Hour Division, United States Department of Labor, as to the asserted specific propositions set forth in the original petition and prayer, and the following additional specific propositions:

G.

Has the defendant Philip B. Fleming, as the Administrator of the Act, the legal right to enforce or to attempt the enforcement of that section of his opinion (set forth as Exhibit "A" to the complaint of the Tennessee Coal, Iron & Railroad Company) reading: "The workday in underground metal mining starts when the miner reports for duty as required at or near the collar of the mine, and ends when he reaches the collar at the end of the shift," against these plaintiffs?

H.

Has the defendant Philip B. Fleming, as the Administrator of the Act, the legal right to enforce or to attempt the enforcement of that section of his opinion (set forth as Exhibit "A" to the complaint of the Tennessee Coal, Iron & Railroad Company" reading: "the workday also includes the aggregate of the time spent on the surface in obtaining and returning lamps, carbide and tools, and in checking in and out," against these plaintiffs?

I.

Are these plaintiffs in any way bound or obligated to follow that portion of the opinion of the Administrator (Exhibit "A" to the complaint of Tennessee Coal, Iron & Railroad Company) referred to in the first paragraph of said opinion reading: "The workday in underground metal mining starts when the miner reports for duty as required at or near the collar of the mine, and ends when he reaches the collar at the end of the shift"?

J.

Are these plaintiffs in any way bound or obligated to follow that portion of the opinion of the Administrator

(Exhibit "A" to complaint of Tennessee Coal, Iron & Railroad Company) referred to in the second paragraph of said opinion reading: "The workday also includes the aggregate of the time spent on the surface in obtaining and returning lamps, carbide and tools, and in checking in and out"?

K.

Is the opinion of the Administrator (Exhibit "A" to the complaint of the Tennessee Coal, Iron & Railroad Company) a correct interpretation of Section 7 of the Act?

B. Premises Considered, plaintiffs further petition and pray that the Court adjudge and answer, separately and severally, each of the questions specifically set forth in the above paragraphs numbered "A" to "F", both inclusive, so far as they are applicable to defendant Philip B. Fleming, Administrator of the Wage and Hour Division, United States Department of Labor, and further that the Court adjudge and answer, separately and severally, each of the questions specifically set forth in the above paragraphs numbered from "G" to "K", both inclusive, and determine and declare that those portions of the Administrator's opinion as set forth in Exhibit "A" to the complaint of Tennessee Coal, Iron & Railroad Company, in the first and second paragraphs thereof, and reading as follows:

"The workday in underground metal mining starts when the miner reports for duty as required at or near the collar of the mine, and ends when he reaches the collar at the ends of the shift."

"The workday also includes the aggregate of the time spent on the surface in obtaining and returning lamps, carbide and tools, and in checking in and out."

are incorrect, improper and illegal interpretations of Section 7 of the Act, and that these plaintiffs are not in any way bound or obligated to comply therewith, and that the said Philip B. Fleming, Administrator of the Wage and Hour Division, United States Department of Labor, and the said Wage and Hour Division, United States Department of Labor, and his or its agents and representatives be restrained and enjoined from attempting to enforce or to threaten to enforce or attempting to administer or to threaten to administer Section 7 of said Act as against these plaintiffs, or any of their representatives or employees, as interpreted by him in the opinion (Exhibit "A" to the complaint of Tennessee Coal, Iron & Railroad Company), and in reference to those portions of said opinion as set forth in paragraphs one and two thereof and as quoted above, and plaintiffs pray for a general declaratory judgment with reference to the questions propounded by this petition, and a judgment against the defendants, including Philip B. Fleming, Administrator of the Wage and Hour Division, United States Department of Labor, for costs herein, and if the plaintiffs be mistaken in the relief prayed for, plaintiffs hereby pray for such other, further, different and general relief as to the Court may seem just, meet and proper, premises considered.

BORDEN BURR,
E. L. ALL,
Attorneys for Plaintiffs.

State of Alabama,
County of Jefferson.

This day personally appeared before me, a Notary Public in and for the State and County aforesaid, Borden Burr who being first duly sworn, on oath deposes and says that he is attorney and agent for the Tennessee Coal, Iron & Railroad Company, a corporation, and the Republic Steel Corporation, a corporation, named as plaintiffs in the foregoing petition; that as such attorney and agent he is

authorized to make this affidavit; that he has read over the facts set forth in the foregoing amendment to the complaints therein; that he is familiar with the facts as therein set forth, and that said facts as therein stated are true, except where stated on information and belief; and where so stated he verily believes the same to be true.

BORDEN BURR.

Subscribed and sworn to before me this 19 day of June, 1941.

MARGARETTE KENNEDY,
Notary Public.

(Seal)

State of Alabama,
County of Jefferson.

This day personally appeared before me, a Notary Public in and for the State and County aforesaid Borden Burr who being first duly sworn, on oath deposes and says that he is attorney and agent for the Sloss-Sheffield Steel & Iron Company, a corporation, named as plaintiff in the foregoing petition; that as such attorney and agent he is authorized to make this affidavit; that he has read over the facts set forth in the foregoing amendment to the complaints therein; that he is familiar with the facts as therein set forth, and that said facts as therein stated are true, except where stated on information and belief, and where so stated, he verily believes the same to be true.

BORDEN BURR.

Subscribed and sworn to before me this 19 day of June, 1941.

MARGARETTE KENNEDY,
Notary Public.

(Seal)

I, Borden Burr, of counsel for plaintiffs hereby certify that I have on this the 19 day of June, 1941, served a copy

of the foregoing Amendment of Complaint on the following:

Mr. Jerome A. Cooper, Attorney for Philip B. Fleming as Administrator of the Wage and Hour Division, United States Department of Labor.

Mr. Crampton Harris, Attorney for Raimund Local No. 121, International Union of Mine, Mill and Smelter Workers, et al.

Mr. J. Q. Smith, Attorney for Muscoda Local No. 21935, et al.

This 19 day of June, 1941.

BORDEN BURR,
Of Counsel for Plaintiffs.

Filed June 19, 1941.

---

OBJECTIONS OF PHILIP B. FLEMING, ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR, INTERVENER, TO PLAINTIFFS' MOTION TO PRODUCE DOCUMENTS.

336 (Civil Action Nos. 5232, 5233, and 5234.)

Philip B. Fleming, Administrator of the Wage and Hour Division, United States Department of Labor, intervener in the above actions, objects to and moves the Court to overrule and deny the motion of plaintiffs filed herein to require said Philip B. Fleming to produce certain documents, and assigns the following grounds therefor:

1. All the reports, correspondence and other material which plaintiffs' said motion requests are irrelevant to the determination of the proper issue of these actions.

2. The reports, communications, and documents called for by plaintiffs' said motion are confidential and privileged.

3. The names of employees and other complaints and data supplied to representatives of the Aministrator by employers relating to the internal affairs of their businesses are confidential and privileged.

4. Information gathered by representatives of the Administrator and correspondence, reports, documents, and other material in the files of the Wage and Hour Division are confidential.

5. Regulations of the United States Department of Labor forbid disclosure of official records unless the head of the executive department specifically authorizes such disclosure after determining that access to such records would not defeat the public interests.

6. Documents called for by plaintiffs' said motion which are not confidential and privileged have been made public and are either in possession of the plaintiffs or their attorneys or have been made available to them in the past.

7. Production and inspection of the confidential documents requested by plaintiffs' said motion which have not been made public would be prejudicial to the public interests.

Copies of the documents referred to in plaintiffs' said motion which have been made public, and which plaintiffs

and their attorneys do not have, will be supplied to plaintiffs or made available for copying by intervener.

GERARD D. REILLY,
Solicitor for Labor.
IRVING J. LEVY,
Assistant Solicitor in Charge of Litigation.
JEROME A. COOPER,
Regional Attorney.
ABNER BRODIE,
United States Department of Labor.
Attorneys for Philip B. Fleming, Administrator of the Wage and Hour Division, United States Department of Labor.

Post Office Address:
Wage and Hour Division,
U. S. Department of Labor,
1007 Comer Building,
Birmingham, Alabama.
or
Wage and Hour Division,
U. S. Department of Labor,
Washington, D. C.

Filed June 23, 1941.

## AFFIDAVIT OF PHILIP B. FLEMING, ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR.

338 (Civil Actions Nos. 5232, 5233 and 5234.)

City of Washington,
District of Columbia, ss.

Philip B. Fleming, being duly sworn, deposes and says that he is Administrator of the Wage and Hour Division, United States Department of Labor, and, as intervener, is a party to the above-entitled actions. These actions were brought under the Federal Declaratory Judgments Act (28 U. S. C., Section 400), and involve the correct interpretation of Section 7 of the Fair Labor Standards Act (hereinafter referred to as the Act) as related to the hours worked by employees in plaintiffs' underground iron ore mines.

### Irrelevancy of Documents Requested.

Deponent is advised by counsel that all the reports, correspondence and other material which plaintiffs' motion requests are irrelevant to the determination of the proper issues of these cases. Although plaintiffs' motion states that such documents are relevant on the question of the weight to be given to the Administrator's interpretation, deponent is advised by counsel that the sole issue of these cases is what constitutes hours worked by underground iron ore miners; the issue is not the weight to be given to his interpretation. Consequently, investigations and other steps taken and studies, surveys and other means employed by the Administrator in determining what he considers the proper interpretation would not seem relevant to the determination of the issues involved in these cases.

Duties of Administrator and his Representatives.

One of the duties entrusted to the Administrator by the Act is that of enforcing its provisions. By Section 11(a) the Administrator and his representatives are authorized to investigate and gather data regarding the wages, hours, and other conditions and practices of employment in any industry subject to the Act for the purposes of ascertaining whether the substantive provisions of the Act are being complied with and to obtain information which may aid in the enforcement of the provisions of the Act. Section 4(b) of the Act empowers the Administrator to appoint such employees and establish such regional and local agencies as he deems necessary to carry out his functions and duties under the Act.

In performing his duties the Administrator has established regional and branch offices, and engaged attorneys, economists, inspectors and other employess. Inspectors and regional officials, including regional directors, are required to make inspections, investigations and perform other duties as directed by superior officials in Washington and to make reports to their superior officials in Washington of the result of their investigations, inspections, and the performance of other duties. Because of the distances of the regional offices from Washington and in the interest of economy, it is necessary that communications between employees at regional and subsidiary offices and their superior officers at Washington be almost entirely by correspondence and written reports. Accordingly, it is necessary that such reports be elaborate and contain all matters affecting policy which the regional officials desire to call to the attention of the Washington officials and which the latter wish to call to the attention of regional officials. Included in correspondence and reports between the Washington office and the regional and subsidiary offices are comments and matters of a highly confidential nature

bearing upon various considerations of policy involved in the internal administration of the Wage and Hour Division.

In connection with his duties the Administrator has also created a branch in the Wage and Hour Division known as the Research and Statistics Branch in which are employed economists, statisticians, research assistants and others, who, among other things, investigate and collect data regarding various industries subject to the Act, and investigate such facts as may aid in the enforcement of the Act. Such investigations are by means of field surveys, statistical analysis, studies of authoritative documents and publications, questionnaires, conferences with employer and employee groups, public hearings, and other methods. The results of such investigations, when the Administrator deems the information of public interest, are made public; but the names of persons and firms from whom information is obtained and correspondence and other communications with them are confidential. Such investigations are employed by the Administrator as an aid in formulating his policies respecting the enforcement of the provisions of the Act by the institution of Court actions or by requesting the Attorney General of the United States to institute criminal proceedings.

Confidenial Nature of Materials Gathered By Administrator and Representatives.

One of the precautions which must be taken by inspectors and other employees of the Wage and Hour Division and the Administrator is to keep the material which they gather in the strictest confidence. Employees and other complainants would be loath to make complaints of violations of the Act unless they could be assured that their identity will not be disclosed. The disclosure of their identity would frequently lead to their discharge, black-

listing, and other discriminatory measures by the persons complained against. Unless the Administrator is able to assure such complainants and employees against disclosure of their identity, it would be impossible to secure free disclosure by them of facts respecting violations of the Act passed for their benefit and would make the enforcement of the Act extremely difficult if not impossible. Accordingly, the Wage and Hour Division has given public assurance to employees that their complaints would not be disclosed, and the form adopted by the Wage and Hour Division for the taking of employees' complaints is expressly stated to be a confidential complaint form and contains on its face a direction that all information regarding complaint must be held absolutely confidential.

Furthermore, in connection with investigations by representatives of the Administrator into industries subject to the Act, employers have supplied to representatives of the Administrator data which relate to the internal affairs of their businesses with the assurance that such data would not be disclosed to persons who are not authorized to have access to them.

Because of these considerations, it has always been essential for the proper public administration of the Act to provide against disclosure of such confidential reports and communications. Accordingly, the regulations of the Wage and Hour Division governing the conduct of its employees provide:

a. Confidential nature of information.

(1) Employers' records.—The inspector, through his authority to examine employers' records, has access to highly confidential information. Such information must never be discussed in any circumstances with anyone except officers and employees of the Division and then only

in the course of duty. A situation in one plant must not be discussed with or divulged to the owner of another plant, employees thereof or their representatives. If the inspector is asked to copy payroll reports for the use of the Division in a special study not related to enforcement, he should assure the employer that such information will be used without revealing the identity of the establishment.

(2) Complaints.—Similarly, the inspector must safeguard information received in complaints and regard it as highly confidential. The inspector must safeguard the identity of the complaint. No written complaint or other record revealing the identity of a complainant should be used in a way which may bring it, even inadvertently, to the attention of an employer.

Said regulations further provide:

(8) No investigator shall *disclose* to any unauthorized person any information obtained in an official capacity.

(9) No investigator should respond to any *subpoena* relation to any official matter until he has notified his superior and obtained permission to appear. No books, papers, records or documents in the possession of any investigator should be produced in responsee to any subpoena unless such production has been authorized by the proper superior.

Confidential Nature of Intradepartmental Reports, Etc.

Much of the information gathered by representatives of the Administrator, and correspondence, reports, documents, and other material in the files of the Wage and Hour Division relate to the internal policies and administration of the Wage and Hour Division, which is a part of

an executive branch of the Government of the United States.

Should the Administrator be required to make public the documents and correspondence called for by the plaintiffs he would reveal to the plaintiffs, their attorneys, and the public generally, governmental reports on matters of importance which must be kept completely confidential for the proper functioning of the Wage and Hour Division and the effective enforcement of the Fair Labor Standards Act. Disclosure of intra-departmental memoranda relating to questions of policy in the administration of the Wage and Hour Division would permit plaintiffs, their attorneys, and the public generally to pry into the internal administration of the Wage and Hour Division and intradepartmental policies.

For these and other reasons, it has always been essential for the proper public administration of any statute or any branch of an executive department of the government to provide against disclosure of official communications and reports. Thus, the regulations of the United States Department of Labor, as do the regulations of other executive departments of the United States, provide and have provided ever since 1915 against disclosure of official records unless the head of the executive department specifically authorizes such disclosure after determining that access to such records would not defeat the public interest. Article III of the regulations of the Department of Labor provides as follows

Section 1.—No account, letter, record, file or other document or paper in the custody of the Department, or of any bureau, office, or officer thereof, shall on any occasion be taken or withdrawn by any agent, attorney, or other person not officially connected with the Department;

no exception will be made without the written consent of the Secretary.

## Copies.

Sec. 2. Copies of accounts, letters, records, files, and other documents or papers shall not be furnished to any person except with the written consent of the Secretary. Such written consent will be granted only to such persons as may have a personal material interest in the subject matter of the papers or at their request. Applications for copies of documents, accounts, records, or files should be made to the Secretary and should be accompanied by an affidavit setting forth the interest of the applicant and showing the reason why and the purpose for which the copies are desired. Except where requests are made by the Attorney General under section 188 of the Revised Statutes for evidence touching the claims of persons suing the United States in the Court of Claims, or by persons making the application and affidavit provided for in the act of August 13, 1894, as amended by the act of February 24, 1905 (33 Stat. L., 812), copies of accounts, letters, documents, records, or other papers desired by or on behalf of parties to causes pending in any Court shall be furnished only to the Court on an order or a rule of the Court requesting the Secretary to furnish the same, and then only when the production of such copies will not, in the judgment of the Secretary, be prejudicial to the Government or the public interest. No exception will be made without the written consent of the Secretary.

(Regulations of the Department of Labor, 1915, Page 83-84.)

Confidential Character of Certain Documents Requested by Plaintiffs.

The field survey and questionnaire referred to in paragraphs A and B of plaintiffs' motion contain information and data which the Administrator's representatives have collected to aid the Administrator in the enforcement of the provisions of the Act. Some of the data were voluntary, supplied upon the representations of employees of the Wage and Hour Division that they would be considered confidential. Other data were obtained by personal investigations. The results of the said surveys and questionnaires were embodied in a memorandum and a study both of which were supplied by the Wage and Hour Division to the American Mining Congress. The Administrator is willing to supply plaintiffs with copies of said memorandum and to permit plaintiffs to have access to and inspect said study in response to the request contained in Paragraphs A and B of plaintiffs' motion.

The reports by the Regional Directors to the Administrator referred to and requested in paragraphs C and J of plaintiffs' motion relate to the internal administration of the Wage and Hour Division and matters of governmental policy respecting the enforcement of the Act, as do the files and documents relating to the *Cornucopia Gold Mines* case which are requested in paragraph I of the plaintiffs' motion. The pleadings and other papers which are filed in Court in that case are matters of public record available to plaintiffs.

So far as necessary to acquaint the public with his enforcement policies, deponent has made public certain of the matters referred to in paragraph K of plaintiffs' motion; and he is willing to supply plaintiffs with copies of releases containing his interpretation of what constitutes hours worked in underground coal mines. Correspon-

dence, files, documents and papers which the Administrator has not disclosed are confidential governmental records. Similarly, complaints filed by employees or on their behalf which are referred to in paragraph N are confidential.

The documents referred to in paragraphs O to T, inclusive, of plaintiffs' motion are intradepartmental correspondence and reports relating to internal affairs of the Department of Labor and the Department of Justice and are confidential governmental records.

Further, said correspondence and reports are not in the control of deponent and he is informed and believes that they are in the control of the Attorney General of the United States and have been in his control since the transfer, by executive order of the President, of the Immigration and Naturalization Service from the Department of Labor to the Department of Justice.

Public Documents Are Available to Plaintiffs.

Deponent is informed that copies of all other documents referred to in plaintiffs' motion are either in possession of the plaintiffs or their attorneys or have been made available to them in the past. Should plaintiffs and their attorneys not have copies such of the material referred to in their motion as has been made public, deponent is willing to supply copies to them or to make available for copying those documents of which copies are not now available for distribution.

It would appear that the sole purpose to be served by the production and inspection of the confidential documents requested by plaintiffs would be embarrassment and annoyance to the Wage and Hour Division in the administration of the Fair Labor Standards Act and serious

interference with the vital public interests involved. Paintiffs, it would seem, would not be prejudiced by the failure to disclose such reports and correspondence whereas disclosure would have a serious effect upon the operation of an important branch of the government and would be contrary to public policy.

PHILIP B. FLEMING.

Subscribed and sworn to before me this 20 day of June, 1941.

HARRIETTE E. SPALDING,
Notary Public.

(Seal)

My Com. Exp. 4/1/44.

Filed June 23, 1941.

OBJECTIONS OF PHILIP B. FLEMING, ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, U. S. DEPARTMENT OF LABOR, TO INTERROGATORIES PROPOUNDED BY PLAINTIFFS.

348 (Civil Actions Nos. 5232, 5233 and 5234.)

To: Benners, Burr, McKamy and Forman,
Attorneys for Tennessee Coal, Iron and Railroad Company and Republic Steel Corporation,
Plaintiffs,
Brown Marx Building,
Birmingham, Alabama.

Crampton Harris, Esquire,
Attorney for Muscoda Local No. 123, et als,
Defendants,
First National Building,
Birmingham, Alabama.

Messrs. J. Q. Smith, Ralph W. Quinn, and W. F. Spencer,
Attorneys for Muscoda Local No. 21935, et als,
Defendants,
Farley Building,
Birmingham, Alabama.

Bradley, Baldwin, All and White,
Attorneys for Sloss-Sheffield Steel and Iron Company, Plaintiff,
Comer Building,
Birmingham, Alabama.

Now comes the intervener, Philip B. Fleming, Administrator of the Wage and Hour Division, United States Department of Labor, and objects to the written interrogatories propounded to him by plaintiffs on the grounds

that said interrogatories are not material and relevant to the issues of these cases, and many call for information contained in confidential government files and which is privileged from disclosure.

Wtihout waiving his objections to the relevancy and materiality of said interrogatories and reserving his right to object to the introduction of such interrogatories and the answers thereto at the trial of these cases, intervener will answer many and will file said answers within the time limited by rules of Court.

The following interrogatories will not be answered by the intervener and they are all, and each is, objected to on the grounds that they are not material or relevant to any of the issues of these cases, and because they relate solely to an attempt to probe the processes by which an administrative officer of the United States Government reached a conclusion respecting the policies to be pursued by him in performing his official duties, and the correctness of that conclusion is not an issue before this Court, and for the additional reasons hereinafter specified:

Interrogatory II:

C.

(b)

(c)

D.

E.

(a)

(b)

(c)

(d)

(e)

H.

(a)

(b)

(c)

(d)

(e)

I.

J.

K.

L.

M.

O.

P.

Q.

Interrogatory III:

A.

(a)

(b)

(c)

(d)

(e)

B.

C.

D.

Interrogatory IV:

A.

(a)

B. This interrogatory is also objected to on the further ground that it calls for the production of copies of privileged and confidential documents, disclosuree of which would be contrary to public policy.

C. This interrogatory is also objected to upon the additional grounds stated in objection to Interrogatory IV B.

D. This interrogatory is also objected to upon the additional grounds stated in objection to Interrogatory IV B.

E. This interrogatory is also objected to on the ground that copies of the material referred to have been made available to plaintiffs and that much of the material referred to therein came from the plaintiffs themselves or their counsels.

F.

G.

(a)

(b)

(c)

(d)

H.

I.

J.

K.

L.

L(1)

L(2)

M.

N.

Interrogatory V:

A.

(a)

(b)

(c)

(d)

(e)

B.

C.

K.

L. This interrogatory is also objected to upon the further ground that it is repetitious and vexatious.

M.

(a) This interrogatory is also objected to on the further ground that it calls for confidential and privileged information, disclosure of which would be contrary to public policy.

(b) This interrogatory is objected to upon the same ground assigned in V M (a).

(c) This interrogatory is objected to upon the same ground assigned in Interrogatory V M (a).

N.

(a) This interrogatory is also objected to on the further ground that it calls for confidential and privileged information, disclosures of which would be contrary to public policy.

(b) This interrogatory is objected to upon the same ground assigned in Interrogatory V N (a).

(c) This interrogatory is objected to upon the same ground assigned in Interrogatory V N (a).

(d) This interrogatory is objected to upon the same ground assigned in Interrogatory V N (a).

(e) This interrogatory is objected to upon the same ground assigned in Interrogatory V N (a).

(f) This interrogatory is objected to upon the same ground assigned in Interrogatory V N (a).

(g) This interrogatory is also objected to on the further ground that it calls for the production of copies of privileged and confidential documents, disclosure of which would be contrary to public policy.

Interrogatory VI:

A.

B.

C.

D.

E.

F.

G.

Interrogatory VII:

A. Intervener refers to the answer filed herein on his behalf.

B. Intervener refers to the answer filed herein on his behalf. Intervener objects further to this interrogatory on the ground that it is repetitious and vexatious.

C. Intervener refers to the answer filed herein on his behalf. Intervener objects further to this interrogatory on the ground that it is repetitious and vexatious.

D.

(a)

(b)

(c)

Interrogatory IX:

A. This interrogatory is also objected to on the further ground that it calls for confidential and privileged information, disclosure of which would be contrary to public policy.

B. This interrogatory is objected to upon the same ground assigned in IX.A.

C. This interrogatory is also objected to on the further ground that it calls for the production of copies of prili-

leged and confidential documents, disclosure of which would be contrary to public policy.

GERARD D. REILLY,
Solicitor of Labor.
IRVING J. LEVY,
Assistant Solicitor in Charge of Litigation.
JEROME A. COOPER,
Regional Attorney.
ABNER BRODIE,
United States Department of Labor.
Attorneys for Philip B. Fleming, Administrator of Wage and Hour Division, United States Department of Labor.

Post Office Address:
Wage and Hour Division,
U. S. Department of Labor,
1007 Comer Building,
Birmingham, Alabama.
or
Wage and Hour Division,
U. S. Department of Labor,
Washington, D. C.

Served by handing a copy of the foregoing to Benners, Burr, McKamy and Forman, Attorneys for Tennessee Coal, Iron and Railroad Company and Republic Steel Corporation, Plaintiffs, Brown Marx Building, Birmingham, Alabama; a copy to Crampton Harris, Esq., Attorney for Muscoda Local No. 123, et als, Defendants, First National Building, Birmingham, Alabama; a copy to Messrs. J. Q. Smith, Ralph W. Quinn, and W. F. Spencer, Attorneys for Muscoda Local No. 21935, et als, Defendants, Farley Building, Birmingham, Alabama; and a copy to Bradley,

Baldwin, All and White, Attorneys for Sloss-Sheffield Steel and Iron Company, Plaintiff, Comer Building, Birmingham, Alabama, this 27 day of June, 1941.

JEROME A. COOPER.

Filed June 27, 1941.

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NOTICE OF INTERVENER OF TAKING OF DEPOSITIONS OF WITNESSES AT BIRMINGHAM, ALA., omitted from the printed record, pursuant to Rule 23 of this Court.

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U. S. Department of Labor

Wage and Hour Division

June 27, 1941.

Address all communications to:
1007 Comer Building,
Birmingham, Alabama.

In reply refer to File No. .... Nos. 5232, 5233, 5234.

Hon. Charles B. Crow, Clerk,
United States District Court,
Birmingham, Alabama.

Re: Tenn. Coal, Iron & Railroad Co. v. Muscoda Local No. 123, et als; Sloss-Sheffield Steel & Iron Co. v. Sloss Red Ore Local No. 109, et als; Republic Steel Corp. v. Raimund Local No. 121, et als.

Dear Mr. Crow:

Will you be good enough to issue subponeas for the attendance at oral depositions of the witnesses whose names and addresses are as follows:

At 9:00 a. m.,

Russell Hunt, Sloss-Sheffield Steel & Iron Company, Birmingham, Alabama,

Robert Garrett, Sloss-Sheffield Steel & Iron Company, Birmingham, Alabama,

Julian Sandifer, Sloss-Sheffield Steel & Iron Company, Birmingham, Alabama,

Benj. Davis, Sloss-Sheffield Steel & Iron Company, Birmingham, Alabama,

H. A. Lovejoy, Sloss-Sheffield Steel & Iron Company, Birmingham, Alabama.

At 11:00 a. m.,

M. H. Geisking, Tenn. Coal, Iron & Railroad Company, Birmingham, Alabama,

John Underwood, Tenn. Coal, Iron & Railroad Company, Birmingham, Alabama,

Geo. F. N. Hutchins, Tenn. Coal, Iron & Railroad Company, Birmingham, Alabama,

Carl R. Culverhouse, Tenn. Coal, Iron & Railroad Company, Birmingham, Alabama.

Thomas Chalmers, Tenn. Coal, Iron & Railroad Company, Birmingham, Alabama.

E. M. Ball, Tenn. Coal, Iron & Railroad Company, Bessemer, Alabama.

Rollin D. Osgood, Tenn. Coal, Iron & Railroad Company, Birmingham, Alabama.

At 2:30 p. m.,

R. J. Working, Republic Steel Corporation, Thomas, Alabama,

J. M. Hassler, Republic Steel Corporation Thomas, Alabama,

C. L. Bransford, Republic Steel Corporation, Thomas, Alabama,

Norman E. Thompson, Republic Steel Corporation, Bessemer, Alabama,

Jesse L. Hagy, Republic Steel Corporation, Thomas, Alabama.

The subpoenas should call for the witnesses to appear at the office of the Wage and Hour Division, 1007 Comer Building, Birmingham, Alabama, on July 2, 1941, at the times set forth above.

Sincerely,

JEROME A. COOPER,
Regional Attorney.

Filed June 27, 1941.

Received 17 subs., L. B. Dept. 6-27-41.

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NOTICE OF INTERVENER OF TAKING OF DEPOSITIONS OF WITNESSES AT MINNEAPOLIS, MINNESOTA, omitted from the Printed Record, pursuant to Rule 23 of this Court.

## OBJECTIONS OF PLAINTIFFS TO INTERVENER TAKING ORAL DEPOSITIONS AT BIRMINGHAM.

361 (Civil Actions Nos. 5232, 5233, and 5234.)

Come plaintiffs, separately and severally, and move the Court to make an order that the oral depositions of Russell Hunt, M. H. Geisking, R. J. Working and others named in notice of the taking of depositions served upon plaintiffs on June 26, 1941, shall not be taken upon the following separate and several grounds:

1. Trial counsel in said case, in accordance with notices previously given, will be engaged in appearing at the taking of oral depositions by this same defendant in the states of Minnesota and Colorado, and it is impossible for them to be present at the same time in such widely separated places.

2. The taking of such depositions is unnecessary, because of the fact that the case is set for trial on its merits on July 8, 1941, and the evidence of such witnesses, if desired, may be had orally before the Court at such time.

3. No showing is made of what evidence of such witnesses is expected to be procured, or that the taking of said depositions is material to any of the issues in this case, and, if material, relates to matters controverted or denied or in reference to which stipulations may not be entered into.

4. The taking of such depositions at the time stated in the notice comes within such an unreasonably short time after the giving of the notice that plaintiffs do not have a fair or full opportunity to prepare for the cross-examination of said witnesses or to make their arrange-

ments to be in attendance at the taking of such depositions.

5. The taking of such depositions on such notice will be unnecessarily burdensome, because (a) of the shortness of time given in the notice, and (b) of the shortness of time between the times set for the taking of the depositions, the time of the service of the notice, and the trial of the case, the plaintiffs and their counsel being engaged now, and will continue to be engaged continuously until the time of the trial of the case, in preparation for the presentment of their cases.

And in support of the above separate and several objections, plaintiffs aver:

(A) M. H. Geisking is Vice President in Charge of Sales, John Underwood is Sales Manager, George F. N. Hutchings is Comptroller, Carl R. Culverhouse is Assistant Comptroller, Thomas Chalmers is Vice President in charge of Operations. E. M. Ball is General Superintendent of Ore Mines and Quarries, and Rollin D. Osgood is Chief Engineer, of the Tennessee Coal, Iron & Railroad Company. All of them reside in Jefferson County, Alabama and are available for appearance as witnesses on the trial of the case at the setting thereof on July 8, 1941.

B. R. J. Working is District Sales Manager, J. M. Hassler is Chief Engineer and Manager of Industrial Relations, C. L. Bransford is General Manager of the Birmingham District, Norman E. Thompson is General Superintendent of Iron Ore Mines, and Jesse L. Hagy is Auditor, of the Republic Steel Corporation. All of them reside in Jefferson County, Alabama, and are available for appearance as witnesses on the trial of the case at the setting thereof on July 8, 1941.

C. Russell Hunt is Vice President and Sales Manager, Robert Garrett and Julian Sandifer are employees engaged in the Accounting Department, Benjamin Davis is Vice President in Charge of Operations, and H. A. Lovejoy is Auditor, of Sloss-Sheffield Steel & Iron Company. All of them reside in Jefferson County, Alabama, and are available for appearance as witnesses on the trial of the case at the setting thereof on July 8, 1941.

(D) Plaintiffs aver that it is their purpose to have present the following of the witnesses named above: E. M. Boll, J. M. Hassler, Norman E. Thompson, and Benjamin Davis and Julian Sandifer, that so far as plaintiffs have any knowledge these witnesses are the only witnesses named who have any knowledge of any kind in reference to the matters and issue in this case which may be in any way controverted or in dispute; that as to the other witnesses named, the only suspicion that plaintiffs have as to the purpose of the examination of such witnesses is that it may be on the question of interstate commerce or matters relating to the coverage of the plaintiffs under the Fair Labor Standards Act of 1938. Plaintiffs aver that they do not in any way dispute this coverage, admit it in the complaint, and are perfectly willing to stipulate fully and completely in reference thereto. In addition to this, matters relating to the jurisdiction have been admitted in the pre-trial agreement.

In view of the foregoing, plaintiffs aver that the taking of said depositions will be unreasonable, burdensome, expensive and useless, and unless the allegations herein contained are successfully denied, the purpose of the taking of such depositions can be accorded to no other motive than that, not of fishing, but of seining for possible evidence which may be of advantage to the defendant intervener on the trial of the cases.

BORDEN BURR,
E. L. ALL,
Attorneys for Plaintiffs.

Address: Birmingham, Alabama.

The above motion will be called to the attention of the Court and set for hearing, the Court agreeing on Tuesday, July 1, 1941, at 9 o'clock A. M.

BORDEN BURR,
Attorney for Plaintiffs.

Service has been made by handing a copy of the foregoing to Jerome A. Cooper, of counsel for Philip B. Fleming, Crampton Harris, counsel for the defendants affiliated with the CIO, and J. Q. Smith, of counsel for defendants affiliated with the American Federation of Labor.

This 27th day of June, 1941.

BORDEN BURR,
E. L. ALL.

Filed June 27, 1941.

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## ORDER DENYING MOTION FOR PRODUCTION OF DOCUMENTS.

365 (Civil Actions Nos. 5232, 5233, and 5234.)

This matter having come on for argument on motion of plaintiffs to require Philip B. Fleming, Administrator, Wage and Hour Division, United States Department of Labor, intervener, in these actions, to produce certain reports, communications, and other documents and for permission to inspect and make copies thereof, pursuant to Rule 34 of the Rules of Civil Procedure, and the said Philip B. Fleming having filed objections to the granting of said motion and his affidavit in support of the said objections; and the Court having heard and considered arguments of counsel;

And it appearing to the Court that the plaintiffs' said motion calls for the production and disclosure of reports, communications and other documents which are irrelevant and immaterial to the determination of the issues of these actions;

And it further appearing that said reports, communications and other documents are confidential documents of an agency of an executive department of the United States and are privileged from disclosure;

It is, on this 28th day of June, 1941, Ordered that the plaintiffs' said motion be and the same is hereby denied.

T. A. MURPHREE,
United States District Judge.

Filed June 28, 1941. Chas. B. Crow, Clerk, U. S. Dist. Court.

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## INTERVENER'S ANSWERS TO INTERROGATORIES.

366 (Civil Actions Nos. 5232, 5233 and 5234.)

Philip B. Fleming, having been duly sworn, makes the following answers to interrogatories propounded to him in the above-entitled case except those interrogatories to which intervener has filed objections.

Answer to Interrogatory I—A: I was appointed on the 4th day of March, 1940.

Answer to Interrogatory I—A (b): If I understand your question correctly, the answer is March 4, 1940.

Answer to Interrogatory I—A.(c): I began to serve as Administrator on the 4th day of March, 1940.

Answer to Interrogatory I—B: Yes.

Answer to Interrogatory I—C: See answer to Interrogatory I—A.(c).

Answer to Interrogatory I—D: Yes.

Answer to Interrogatory I—E (b): Yes.

Answer to Interrogatory I—F: Elmer E. Andrews and Harold D. Jacobs acted as previous Administrators. So far as I know, all the papers, files and records of the Wage and Hour Division as administered by the previous Administrators were turned over to me and are now under my direction and control as Administrator.

Answer to Interrogatory I—G: This question can not be answered unqualifiedly. I have access to the papers which have to do with the administration of the Fair Labor Standards Act.

Answer to Interrogatory I—H: I have no control or direction over papers in the Department of Labor other than those papers which pertain to the administration of the Wage and Hour Division. My ability to secure such papers is dependent upon receiving permission from the Secretary of Labor, who has control of such papers.

Answer to Interrogatory I—I: The only papers in departments of the Department of Labor, Other than the Wage and Hour Division, which may be relevant to the issues of this case are those containing information which has been made public and which, I am informed by counsel, are subject to judicial notice.

Answer to Interrogatory I—J: I should be willing to request of the heads of departments of the Department of Labor, other than the Wage and Hour Division, papers, files and records which have been made public and are not confidential and are relevant and material to the issues of this case.

Answer to Interrogatory II—A: Yes.

Answer to Interrogatory II—B: See answer to II—A.

Answer to Interrogatory II—C.(a): It was signed on the date indicated on the report, March 15, 1941.

Answer to Interrogatory II—F: It has been and is customary in the Wage and Hour Division of the United States Department of Labor to release opinions and reports to the press in mimeographed form and for distribution to the public generally, when in the opinion of the Administrator it is deemed to be of sufficient public interest.

Answer to Interrogatory II—G: Yes.

Answer to Interrogatory II—H: This designation signifies the official release of the opinion of the Administrator. It is a revision of an unofficial release.

Answer to Interrogatory II—N: My opinion is correctly stated as set forth in Exhibit A of the petitioner's complaint. It is my present opinion as Administrator. The opinion referred to is a notification and a guide to all interested parties of my interpretation of the Fair Labor Standards Act as applied to the situation described in that opinion. There is no duty imposed upon me by the Act to issue any interpretations and such interpretations as are issued by me are not binding upon the Courts or the parties. I intend to follow the interpretation in ques-

tion unless directed otherwise by the authoritative ruling of the Courts, or unless I should subsequently decide that my prior interpretation is incorrect.

Answer to Interrogatory V—D.(a): I am attaching the release that was authorized for publication on Saturday, July 27, 1940.

Answer to Interrogatory V—C.(b): See D.(a).

Answer to Interrogatory V—E: See answer to D.(a).

Answer to Interrogatory V—F.(a): I am attaching release G-81 that was authorized for publication on Wednesday, September 18, 1940.

Answer to Interrogatory V—F.(b): See F.(a).

Answer to Interrogatory V—G: See V—F.(a).

Answer to Interrogatory V—H: Yes.

Answer to Interrogatory V—I: The answer was correctly printed with the exception that wherever the personal pronoun "I" was used, "Colonel Fleming" was inserted.

Answer to Interrogatory V—J: Attached hereto is Interpretative Bulletin No. 13. It is believe that this is the bulletin meant by the interrogatory and not Interpretative Bulletin No. 12.

Answer to Interrogatory VIII—A: I am informed that there are authoritative studies made by government agencies or under governmental auspices of the production of iron ore in underground mines of the U. S. and that such studies are public documents and are as available to

plaintiffs and their counsel as they are to me or my counsel or representatives. I am further informed that the Research and Statistcs Branch of the Wage and Hour Division has made no such studies, but that it may, in preparation for the trial of these cases, consult authoritative sources to determine the production of iron ore by underground mines of the U. S. Counsel informs me that such data are the subject of judicial notice.

Answer to Interrogatory VIII—B: See answer to A.

Answer to Interrogatory VIII—C: See answer to A.

Answer to Interrogatory VIII—D: See answer to A.

Answer to Interrogatory VIII—E: Because of its indefiniteness, I am not sure what this question means. If it is meant to inquire whether the Wage and Hour Division has considered competition between underground iron ore mining operations and open pit iron ore mining operations, or between underground iron ore mining operations and underground operations of mines producing products other than iron ore, my answer is that I am informed that a study of the competition and competitive factors existing between underground and open pit iron ore mining may be made in preparation for the trial of these cases.

Answer to Interrogatory VIII—F: I am informed that at the present time it is not known whether there exists any competitive inter-relationships.

Answer to Interrogatory VIII—G: See F.

Answer to Interrogatory VIII—H: This question is indefinite, since it is not indicated what is meant by "substantial." I do know that there exists differences in

methods of underground iron ore mining operations in different sections of the United States.

Answer to Interrogatory VIII—I: I can not answer this question because of its indefiniteness.

Answer to Interrogatory VIII—J: Yes.

Answer to Interrogatory VIII—K: I can not answer this question because of its indefiniteness.

Answer to Interrogatory VIII—L: Yes.

Answer to Interrogatory VIII—M: See L.

Answer to Interrogatory VIII—N: See L.

Answer to Interrogatory VIII—O: See L.

PHILIP B. FLEMING.

Subscribed and sworn to before me this 27 day of June, 1941.

HARRIETTE E. SPALDING,
Notary Public.

(Seal)

My com. exp. 4/1/44.

Served by handing a copy hereof to Benners, Burr, McKamy & Forman, Brown-Marx Building, Birmingham, Ala.; and a copy to Bradley, Baldwin, Ali & White, Comer Building, Birmingham, Ala., this 1 day of July, 1941.

JEROME A. COOPER.

Filed July 1, 1941.

For Release Morning Papers, Saturday, July 27, 1940.

R-926.

United States Department of Labor

Wage and Hour Division

Washington

Two Mining Determinations Announced.

Two administrative determinations, one dealing with the status of lessees in metal mines, the other with working time in bituminous coal mines, were announced today by Colonel Philip B. Fleming, Administrator, Wage and Hour Division, U. S. Department of Labor.

The first determination was made at the request of metal mine operators and lessees of such operations in the intermountain states on the question of whether or not lessees of mining property are considered by the Wage and Hour Division as employees under the Fair Standards Act. Colonel Fleming stated that each case must be determined on its particular facts, with primary importance given to the terms of each individual lease agreement and the method of operation under such agreement. If under the lease agreement control and supervision over the operations of the so-called lessee are reserved to the lessor, such lease agreement embodies the normal incidents of the employer-employee relationship and the so-called lessees will be considered as employees under the Fair Labor Standards Act. On the other hand, if a particular lessee is operating mining property which is not a part of the property currently being operated by the mining company with regular employees, and if in the lease agreement the mining company does not have the right to control the lessee in his operation of the mining property, it may well be that the lessee is not an employee of the mine owner

but is in fact an independent operator of such property. However, Colonel Fleming pointed out, if such lessee has his own employees who assist in the operation of the leased mine, such employees must be paid in accordance with the Fair Labor Standards Act if the products of the mine move in interstate commerce. Colonel Fleming added that in the ordinary case the mine owner retains title to the ore mined by the lessee and his employees and ships the product of the leased mine, along with his own, in interstate commerce. Therefore, if the lessee does not pay his own employees in accordance with the requirements of the Fair Labor Standards Act, section 15(a)(1) (the so-called "hot goods" section of the Act) prohibits the mine owner from shipping the product of the leased mine in interstate commerce.

Colonel Fleming also pointed out that two Courts have recently held lessees of mining property to be employees of the mine owner. One of the cases was decided by the Supreme Court of Utah under the Utah Unemployment Compensation Act, designated as *"National Tunnel and Mines Company v. Industrial Commission of Utah,"* 102 P. 2d 508. The other decision was under the Fair Labor Standards Act and was rendered by a Federal Judge in Oregon as a result of proceedings instituted by the Wage and Hour Division against the Cornucopia Gold Mines Company. In both of such cases, Colonel Fleming stated, the mining company exercised complete control over the operations performed by the lessees.

The second administrative determination announced by Colonel Fleming today involved the question of determining the number of hours worked by miners in the bituminous coal mining industry.

Colonel Fleming announced that on the basis of an inquiry submitted by the bituminous coal mining industry,

the Wage and Hour Division in carrying out its enforcement duties in that industry will accord great weight to any reasonable standards for determining working time which represent the prevailing customs and practices in the particular industry and are supported by a long history of *bona fide* collective bargaining agreements. In view of the circumstances described by the industry in submitting its inquiry, Colonel Fleming announced that practice of computing working time on a "face to face" basis in the bituminous coal mining industry would not be unreasonable. Colonel Fleming explained the term "face to face" to mean the productive work performed after the miner arrives at his usual working place, excluding the time spent in traveling from the portal or entrance of the mine to the place of work and the time spent in returning from the working place to the portal in the evening. The Administrator added that the determination in the bituminous coal mining industry should not be considered to apply to any mining operations where the traditional practice of computing hours worked differs from the custom in the bituminous coal mining industry.

For Release Wednesday, September 18, 1940.

G-81.

U. S. Department of Labor
Wage and Hour Division
Washington

Address Scheduled for Delivery

By

Colonel Philip B. Fleming, Administrator

Wage and Hour Division
U. S. Department of Labor

Before The

American Mining Congress

Colorado Springs, Colorado

Wednesday, September 18, 1940

Perhaps you have heard the story of the international commission which once decided to write a treatise on the camel.

Each of the collaborators retired to his library or his laboratory, and in due time the Englishman emerged with a two-volume work entitled, "The Camel in Commerce and Industry." The Russian produced a substantial tome entitled, "The Contribution of the Camel to World Revolution." The Frenchman's contribution was a sprightly little book, entitled "The Love Life of the Camel." But it was not until 25 years later that the German was prepared to publish his reasearches with a 12-volume definitive treatise under the simple caption of "Das Kamel."

If you were to ask the first dozen men you meet what they think of the Wage and Hour Law you would, in all probability, get a variety of answers. One man would tell you that it is the greatest contribution in many years to industrial democracy. Another would point to its usefulness in removing some of the causes of industrial conflicts. Still another would emphasize the beneficial effects upon the national health and morale. A workingman whose income has been directly increased to a point where he is able to move into a better house, to better feed and clothe his family, would tell you that the Wage and Hour Law is a very fine thing indeed, and that it is curious nobody ever thought of it before. A girl who in 1938 was working in a factory 60 hours a week for $5 and who now works 42 hours a week for $12.60, would point with gratitude to her increased leisure and to the fact that she no longer has to be partially supported by charity. The merchant would tell you that the law has better distributed mass buying power so that he now does a greater volume of business at greater profit. One manufacturer would assert that the law has saved him from bankruptcy by lopping off competition based upon starvation wages, but another would point only to his greater labor costs, assure you that the Wage and Hour Law is going to wreck the country's economy, and declaim that this unconscionable interference with business has got to stop.

Much depends upon the point of view. You may recall that other story about the inquisitive old gentleman who stopped at the site of some construction that was going on and asked one of the workmen, "What are you making?" And the workman said, without glancing up, "Four dollars and seventy-five cents a day." He asked another, who replied, "I am making some mortar for the use of the stone-masons." But a third drew himself up proudly, turned his gaze heavenward, and said, "I am building a cathederal.

As to any piece of social legislation designed to build a better and happier and a stronger country, what each man tends to think of it depends upon whether it is going to gore his own private and particular ox, or help to fatten him.

In other words, to change the metaphor, I think each of us tends at times to permit the trees to obscure our view of the forest. This tree may be a gnarled and knotty old oak, and that one a straight and stalwart pine, but beyond them both the forest still stands in all its splendor.

Whether we personally like or dislike the Wage and Hour Law, it is a good thing to stop occasionally and re-examine the conditions in this country that brought about its enactment, and to remind ourselves just what it was that Congress and the people expected it to accomplish when they wrote it on the statute books.

Here is one industrial establishment in which wage rates are so low that the workers cannot exist without the supplement of charity or relief. And here is another establishment in the same industry in another part of the country which wants to pay better wages. But if it does pay higher wages it will be at a great disadvantage in competing with the rival firm with the low wage rates. Aside from the purely humanitarian considerations, does any responsible businessman want to see the starvation wage virus creeping across the country, as it used to do, until it contaminates all of industry and interferes with the free flow and orderly marketing of goods in commerce?

Again, several million men and women were out of work in the United States through no fault of their own. But at the same time there were men and women in certain industries who were being required to work 60, 70,

and even 80 hours a week. When such long hours of toil are permitted to obtain in one place, is it not likely that they will be spread by the competitive struggle to other places? Would it not be better to place some limit on the working week so that more people can be employed?

Strikes and industrial disputes, which certainly are not good for the industry of the country, frequently have been fomented by starvation wages and too long hours of employment. Would it not be a good thing for industry, as well as for the country as a whole, to prevent some of those industrial conflicts by removing one of their most provocative causes?

These are the improvements in our traditional ways of doing business that the Wage and Hour Law was intended to bring about. Are they desirable improvements? Do you know of any better way in which they could have been achieved than the way that was employed, namely; by placing at least a minimum floor under wages and by setting a limit to the length of the workweek—at the same time permitting the employer to exceed the maximum workweek, whenever he feels that necessity requires, upon paying, as a penalty for the privilege, wages at the rate of time and a half for the excess hours? I do not know of any way in which the benefits desired could have been achieved except by placing all of industry covered by the Act upon exactly the same basis in these matters, with such exceptions and deviations as might be necessary to prevent the substantial curtailment of employment or earning power, which would have defeated the purpose of the Act.

Congress recognized that American industry is diverse and that flexibility is essential in the administration of any law designed to apply to all of it in interstate commerce. I feel that Congress provided rather generously

for such necessary flexibility, and while all of it is not available to your industry, some of it is.

For example, provision was made for the employment of learners, apprentices and handicapped workers at wages less than the minimum. A method was devised for the partial relaxation of the hours requirements in industries found to be seasonal, and this relaxation has been applied to certain gold placer operations. Certain industries are wholly exempt from the hours provisions or from both the minimum wage and maximum hours. Certain occupations were exempted from both the wage and hour provisions—such as those of executives, professional workers and outside salesmen. Provision was made whereby partial relaxation from the hours requirements may be obtained under certain types of collective bargaining agreements. This should be of considerable interest to the mining industry. Finally, the hours standards are not hard and fast limitations. Employees can be worked any number of hours a week, provided only that time and a half is paid for work in excess of the statutory maximum.

I am under the impression that no other industry has presented more complicated problems of compliance to us than metal mining. Almost daily we receive a letter or telegram from somebody in the industry asking for an opinion, or an interpretation, or suggesting some arrangements of hours and wages which he wants us to approve as meeting the requirements of the Act.

One might conclude from this mass of correspondence either that metal mining doesn't want to comply with the law and is looking for a loophole, or that the nature of the industry is such that compliance is more troublesome than in other industries. Let me say at once that I entertain no suspicion that the former may be the correct explanation. I know too many people in metal min-

ing to believe for a moment that the vast majority of the employers are trying to avoid compliance. The very fact that so many of you have written to us in itself is rather conclusive evidence that this matter weighs upon your conscience. If you had not wanted to comply you wouldn't have taken the trouble to tell us your troubles; you would simply have gone along in the old way and waited until we caught you.

No, I think the real explanation is that the industry really is different. In all the country there is no other quite like metal mining.

A part of your difficulty and ours arises from the very nature of the mining industry itself. It is carried on under many varying conditions of climate and geography. There are low grade mines and high grade mines. There are mines operating near large and populous cities, and mines back in the mountains apart from the main currents of American life. To apply to all of them a single standard of labor conditions is admittedly difficult.

But part of the difficulty, I think, is also due to psychological factors and to custom and tradition. Mining in this country always has been a hazardous undertaking, not only for labor but for capital, too. A good deal of it is carried on in small camps isolated from the rest of the world and in which the manners and customs and values associated with living in populous communities do not seem to apply. An industry which has found it necessary to develop its own disciplines would naturally find it difficult to accept regulation imposed from without.

Only in a few exceptional instances are you having trouble about meeting the minimum wage requirements of the Act. Wages in metal mining generally are far in excess of the present 30-cents-an-hour minimum of the

statute. Your problems are related almost solely to time-and-a-half for overtime.

The contention with which we most frequently are confronted is that, especially in many of the small, low grade mines, you find it difficult to pay time and a half for hours worked beyond 42 a week and still meet your operating costs, to say nothing of making a profit.

It was the intention of Congress, by putting a penalty upon overtime work, to encourage the employment of additional labor. It was a spread-the-work device. It was assumed that imposition of the overtime penalty would encourage employers to eliminate overtime and employ extra workers. But here we meet the contention that this objective is not possible in metal mining because of the difficulty encountered in staggering shifts or in developing a swing-shift operation so that the mine can operate on a six or seven-shift per week basis. The difficulty of providing additional housing for more employees is put forth as a vital factor. Besides, much of the underground work is highly skilled and can be done effectively only by one worker or one group of workers. It would be dangerous to attempt to solve the overtime problem by sending into the mines men who are unfamiliar with the customary techniques and the lay-out of the mine shaft. Not only is it prohibitive to pay time and a half for work in excess of 42 hours a week in many cases, but we have been told that the men themselves don't want a 42-hour week. Many of them are living in remote mining camps and they would much rather put in long hours while at work and save up until they can take time off to go to town.

I should hesitate to attempt to furnish an offhand solution to every problem that has been presented to us, but I want to list some of the principal ones as a basis, at least, for further discussion.

1. Must the time spent by the underground worker in traveling from the portal to the face be counted as time worked?

2. Must time spent at lunch underground be considered as time worked?

3. What is the status of the lessee miner, or the leaser? Is he an employee of the mine owner or really a lessee? Must he and his helpers, whom he employs and pays, be paid time and a half for over-time?

4. What deductions from wages will be considered by the Administrator to be reasonable?

5. Will the operator be protected from liability if he reduces the hourly rate to avoid the payment of over-time?

6. How about the construction employee—the carpenter who produces no goods for commerce, but merely builds new bunk houses, or a drying room, or a recreation hall? Is he covered by the law and must he be paid time and a half for overtime?

We cannot predict in advance just what the Courts are going to say in respect to every problem that arises. The best we can do is to tell you what, in our opinion, the law means, and what, as to any particular problem, the Courts have held in the past in analogous, or somewhat similar, circumstances. The case of the Cornucopia Gold Mine Corporation, however, may be worth citing, because it involved many of the questions which have been raised by other mine operators.

The Cornucopia corporation owns and operates a mining property near Cornucopia, Oregon. There is no railroad

nearer than 27 miles, and the largest "big town" is Baker, Oregon, which has a population of around 8,000 and is 75 miles away. This certainly may be considered an isolated mining property. The company was organized in 1930 and it is operating mines which previously had been worked but abandoned. The company did not commence operations until 1936. It lost money that year and also in 1937, but made a profit of about $122,000 in 1938, and, at the time of our investigation, it was estimated that about the same amount of profit would be made in 1939. Our inspector commented that "the officers and directors appear to be responsible individuals engaged in a legitimate enterprise."

The violations of the law which were reported upon inspection were all related either to overtime or the record-keeping requirements.

About October 24, 1938, when the Wage and Hour Law became effective, the company placed all of its employees on an hourly basis, although before that they had been on an eight-hour shift arrangement. The employees worked 48 hours one week and 56 the next, alternately. However, the new hourly rate was so arranged as to provide approximately the same income as before, and if the exact amount was not arrived at by these calculations, then an arbitrary adjustment was made in some instances to bring the wage up to a sum equivalent to the income as it would have been if figured at the regular daily wage. The question here was, What was the regular rate of pay and did the company pay one and a half the regular rate for overtime since the law became effective? We reached the conclusion that the regular rate of pay was not changed and that, hence, nothing extra was paid for the overtime as required by law.

This pay plan was in effect for 91 surface workers until September 19, 1939, but for the 97 underground workers a new system was devised November 15, 1938. This new system provided that the underground miners would continue to work the same shifts as before the Act became effective. There were two shifts a day and the miners went underground either at 7 P. M. and came out at 3:30 P. M., or in at 7 P. M. and out at 3:30 the following morning. This shift arrangement constituted a total of eight and a half hours spent underground, of which 30 minutes was deducted as a lunch period, leaving a net of eight hours worked per shift. For this the men were paid a set shift wage of $3.50, $4, or $4.50 a day. But the new system provided that the employees show only six hours per shift on their time cards, which they kept themselves and turned in each day. The company then re-established the old shift rates. There could be no overtime because the most that could be worked, even for seven shifts a week, was 42 hours. The company's theory was that this was a proper keeping of time because it was maintained that two hours were consumed in traveling through the tunnel of the mine to the place where the miner actually worked. In other words, time spent in traveling from portal to face and from face to portal was not considered by the company to be time worked. It is interesting to note that while the company recorded that each man spent exactly two hours a day traveling underground, our own investigation showed that no miner actually spent more than 90 minutes daily in underground travel, and that some spent no more than 20 minutes. But, in any event, the question here was whether the time consumed from portal to portal, or only the time actually spent at the face, was to be considered time worked. Our own contention was that time consumed from portal to portal was hours worked, and that for these men the company had failed to pay extra for overtime and had failed to enter on its records the time actually worked.

The company insisted that only 188 employees were directly employed and that 87 were either lessees (or leasers) or employees of leasers, for whom the company was not responsible. We believed that these leasers and their helpers were bona fide employees of the company and had a right to look to it for compensation for their overtime. The normal incidents of the employer-employee relationship existed even though the company called the workmen "lessees."

In regard to this question of the status of lessees under the Wage and Hour Law, I announced in July a determination made at the request of metal mine operators and lessees of such operators in the intermountain States. I stated that each case must be determined on its particular facts, with primary importance given to the terms of each individual lease agreement and the method of operation under such agreement. If under the lease agreement control and supervision over the operations of the so-called lessee are reserved to the lessor, such lease agreement embodies the normal incidents of the employer-employee relationship and the so-called lessees will be considered as employees under the Fair Labor Standards Act.

On the other hand, if a particular lessee is operating mining property which is not a part of the property currently being operated by the mining company with regular employees, and if in the lease agreement the mining company does not have the right to control the lessee in his operation of the mining property, it may well be that the lessee is not an employee of the mine owner, but is in fact an independent operator of such property. However, I pointed out that if such lessee has his own employees who assist in the operation of the leased mine, such employees must be paid in accordance with the Fair Labor Standards Act if the products of the mine move in interstate commerce. In the ordinary case the mine owner retains title

to the ore mined by the lessee and his employees and ships the product of the leased mine, along with his own, in interstate commerce. Therefore, if the lessee does not pay his own employees in accordance with the requirements of the Fair Labor Standards Act, Section 15(a)(1) (the so-called "hot goods" section) prohibits the mine owner from shipping the product of the leased mine in interstate commerce.

Two Courts recently have held lessees of mining property to be employees of the mine owner. One of the cases was decided by the Supreme Court of Utah under the Utah Unemployment Compensation Act, designated as *"National Tunnel and Mines Company v. Industrial Commission of Utah."* The other decision was under the Fair Labor Standards Act and was rendered by a Federal Judge in Oregon as a result of the proceedings instituted by the Division against this same Cornucopia Company. In both cases the mining company exercised complete control over the operations performed by the lessees.

In the Cornucopia case there were 34 employees whom the company claimed were not subject to the Act on the ground that they were employed in constructing a dry room, a recreation room and company house, which employment it held was neither interstate commerce nor the production of goods for interstate commerce. Our attorneys believe that repairs or alterations to existing structures used in the production of goods for interstate commerce are covered by the Act, whereas the construction of entirely new structures may be exempt. The employees engaged exclusively on new construction work were held not to be covered by the law but the employees who were spending part of their time in this work and part in employment clearly subject to the Act were held to be covered.

These were the matters which comprised the substance of our case against the Cornucopia Gold Mines, and these were the practices which the Court enjoined the company from continuing. The Court directed the payment of approximately $13,000 in restitution to some 283 employees. I might add that this was a consent decree, and that the company did not challenge the validity of our interpretations and conclusions.

The portal-to-portal matter also has been presented to us by the bituminous coal mining industry. In response to inquiry I said that the Wage and Hour Division, in carrying out its enforcement duties in that industry, will accord great weight to any reasonable standards for determining working time which represent the prevailing customs and practices in the industry and are supported by a long history of *bona fide* collective bargaining agreements. In view of the circumstances described by the industry in submitting its inquiry, I announced that the practice of computing working time on a "face-to-face" basis in bituminous coal mining would not be unreasonable. The term "face-to-face" was explained to mean the productive work performed after the miner arrives at his usual working place, excluding the time spent in traveling from the portal or entrance of the mine to the place of work, and the time spent in returning from the working place to the portal at the end of the shift. This determination in the bituminous coal mining industry should not be considered to apply to any mining operations where the traditional practice of computing hours worked differs from the custom in bituminous coal mining. In the Cornucopia case, for example, custom and tradition had long recognized the portal-to-portal basis of reckoning time worked.

We are not yet disposed to take any particular position as to whether the half hour spent eating lunch underground may be deducted from hours worked. The prob-

lem is a very difficult one because the employee is required to eat under very unfavorable conditions and is subject to many of the hazards of his job while eating. On the other hand, we recognize that the employee does have time off in order to have lunch and an argument can be made that such time need not be considered as hours worked. But as I say, the Division is not prepared at the present time to make any definitive determination on this question.

Deductions from wages are a recurring source of irritation, but the problem seems to be more acute in coal mining than in metal mining. The law, as you know, defines the wage paid to the employee to include the reasonable cost to the employer, as determined by the Administrator, of furnishing such employee with board, lodging, or other facilities, if such board, lodging, or other facilities are customarily furnished by such employer to his employees. Our regulations on the subject state that "reasonable cost" shall not include a profit to the employer, and that the cost of facilities, such as tools, furnished to the employee not for his benefit but for the employer's, may not be deducted from wages, if such deduction "cuts into" the minimum wage or compensation for overtime. An example of deductions which we could not wholly approve was reported by one of our inspectors in Pennsylvania. A coal miner, who had worked 77 hours in a two-week period for which his earnings were $79.79, was charged 77 cents for lamps, 52 cents for smithing, $3.55 for powder, 75 cents for Social Security taxes, $1 26 for the union check-off, 55 cents for bath, $1.50 for hospital dues, $1.50 for medical service $60.09 for his account at the store, $8.10 for rent, 20 cents for the baseball fun—a total deduction of $78.79, leaving exactly $1. in cash in his envelope. In this case we disallowed the charges for lamps, smithing and powder and that proportion of the store account that represented a profit to the employer. But so long as such

non-deductible items do not "cut into" the minimum wage of 30 cents an hour and no question of overtime is involved, there is no violation of the Act.

Will the operator be protected from liability if he manipulates the hourly rate to avoid the payment of overtime? A rather familiar example of this particular device is illustrated by the case of the employer who, at the time the Act became effective, was paying his employees $4.50 for a normal work day of eight hours. A normal workweek consisted of seven workdays. Thus, the employees earned $31.50 for a workweek of 56 hours. But the employer calls his employees together and makes a little speech. He tells them that it is necessary for him to pay them on an hourly rate. He has decided, he says, to pay them 50 cents an hour for the first six hours of each workday, and 75 cents (time and a half 50 cents) for the seventh and eighth hours. He asks them to agree to this new wage schedule. Since the plan means no change whatever in either hours or total earnings, the employees may accept it. The difficulty with this little scheme, however, is that it is a mere subterfuge.

The division of a normal 8-hour day into 6 "straight time" hours and two "overtime" hours is purely fictitious. The employee is not actually being paid at the rate of 50 cents an hour and the alleged overtime rate of 75 cents is not paid for overtime work. He is simply getting, as he always got, $4.50 for an 8-hour day and his regular rate of pay continues to be 56 cents an hour.

This employer does not comply with section 7 of the Act unless he pays his employees 84 cents an hour (time and one half 56 cents) for each hour they work in excess of 42 hours a week, or a total of $35.28 for a 56-hour week.

That this is so becomes apparent when one stops to reflect about the purpose of the law. The Act is not intended to force employers to pay more money to their employees who work overtime. The Act seeks to induce employers to reduce hours by making overtime work more costly. Thus, if an employer reduced the hours worked by his employees from 56 to 52 or less during the first year of the law, to 51-1 3 or less during the second year, and to 50-2 3 hours or less after this coming October 24, he could continue to pay $31.50 a week, the salary he paid for a 56-hour week prior to the Act, and still be in strict compliance. It can hardly be said that a law which, in the case we have supposed, requires a reduction of 4 hours a week during the first year of its existence, an additional 40 minutes a week during the second year and another reduction of 40 minutes thereafter is seriously burdensome.

In general, mine operators have attempted to meet hours requirements of the Wage and Hour Law by one or another of three types of adjustments: They have reduced the number of shifts to five a week of eight hours each; or they have shortened the shift to approximately seven hours; or they are paying the overtime above 42 hours a week. When the 40-hour provision becomes effective in October it will require the payment of overtime or the cutting of shifts to five a week, at some increase in labor costs, unless this is compensated for by the greater productivity of the workers; as has been the experience of at least one large mine studied by our economists.

Mine operators frequently assure us that their employees are not in sympathy with the maximum week provisions, that they would much rather work 56 or even 70 hours a week at straight time than run the risk of having their total earnings reduced because of the reluctance of employers to pay for overtime. I certainly do not ques-

tion the good faith of those mine owners and managers who give us this assurance, but the weight of the evidence which comes to us from the miners through their own spokesmen is on the other side. The International Union of Mine, Mill and Smelter Workers indorses the Act, including its present overtime provisions, and we have received many letters from individual miners to the same effect. Several months ago a representative of the Wage and Hour Division made extensive inquiries in Montana and while he was told that some miners were anxious to put in long hours at straight time, he says he did not himself succeed in meeting any of them. The fellow who enjoyed working overtime without extra compensation was pretty illusive. He was always over in the next county or in some other part of the State.

In the course of his report this Division representative wrote (and I quote):

"I found an interesting situation in Butte. When the Wage and Hour Act first went into effect the Anaconda Company made a forty-hour week immediately effective. The miners formerly were worked 48. The change resulted in the loss of a day's pay each week, but it also resulted in the employment of about 800 additional miners. Considerable agitation was caused by the change, and the miners' pay was so materially reduced that there was a great deal of dissension. However, a wage and hour committee was appointed representing all the unions in the Butte area, and numerous meetings and hearings were held. As a result of the agitation the Anaconda Company offered to return to the 48-hour week, and pay the miners time and a half for the hours in excess of 44. (This was before the 42-hour week became effective.) When this proposal was received it was submitted by the wage and hour committee to all the unions in Butte, who took a vote on it. The Teamsters' Union voted in favor of the

48-hour week, but all the other unions in Butte voted conclusively against it, and the vote of the miners' union was almost unanimously in favor of the 40-hour week. Butte furnishes an excellent illustration of one place where the Act succeeded in spreading employment in an effective way.

"Because of the statements made to me by miners who are themselves in favor of the 40-hour week, I would give full credence to their estimate indicating that some 10 or 15 per cent of the miners in the isolated mines would favor a longer day. It is significant, however, that in my trip around the State I could not find a single miner who favored it. I believe, however, that when investigations are made it will be found that many violations of the Wage and Hour Law now exist in the isolated mining districts where miners are found employed under many types of contracts. This will be found to be true, I believe, not because of any desire to violate the law, but because, as a matter of custom and convenience, miners in the small camps have been accustomed to work in a haphazard fashion."

I trust I have been able to show you that we are fully aware of most of the problems that perplex you under the Wage and Hour Law. I regret that I am not able on the spur of the moment to produce a sure-fire, litigation-proof answer to every question that you may be able to ask. I do not think anybody can do that. Some of those questions can be answered finally only by the Courts.

It would be pleasant, too, if I could show each of you how you can comply with the law without it costing you a single cent. But I can't do that, either. I don't think Congress expected that you were going to be able to comply without it costing you something. The Wage and Hour Law is social legislation in the board sense, and

like most other good things the attainment of its objectives involves some sacrifice to somebody. It was expected, however, that, though some employers might have to pay more for labor, they, in common with the rest of us, would benefit in the long run from increased mass buying power, better national health, and the greater contentment of workers. These benefits we are now beginning to enjoy.

I think it fair to point out, too, that the price of metals generally has been rising for the last two years. The impetus given to business by the great national defense program, in which metals of all sorts are vitally needed, will be especially to the advantage of mine operators. I might also say that your government for some years, due to its monetary policies, has been subsidizing gold and silver mine owners. Indeed, but for these subsidies, many mines that are operating today and producing rather handsome profits would still be closed.

Some have felt that the war and our necessity for building up the national defense have so radically changed the industrial situation in this country that we shall have to relax the hours requirements of the Wage and Hour Law. The argument runs that while there is an admitted oversupply of idle labor willing and anxious to go to work, there is an acute shortage of skilled labor and that we must permit the skilled labor already on the job to work overtime without paying time and a half for the overtime.

I have discussed this matter several times recently and I do not want to prolong these remarks unduly by undertaking an extensive treatment of it here. Perhaps it will suffice to repeat that in my opinion no relaxation of the overtime provisions of the Act at this time is either necessary or desirable.

It may be natural to assume that if a man can perform so much work in one hour he can perform 60 times that amount of work in 60 hours, or 70 times in 70 hours. But that doesn't happen to be true, as our own experieence in the World War, as well as England's experience both in that conflict and in the present war, amply demonstrates. The Chief of Ordinance and the Quartermaster General of the United States Army both urged restriction of working hours in the World War. Careful studies made in England showed that labor did not produce as much under the 60 hour week as in a shorter workweek, and 45 hours seemed to have been about the optimum, beyond which production fell off, or the workmen, due to fatigue, spoiled about as much material as they satisfactorily completed.

Even if it were true that there is a shortage of skilled labor today, common sense argues the necessity of training more workers now while we have the time for it. If we use up our available supply of skilled labor by requiring long hours of overtime at the beginning of our defensive effort, we will have no reserve to fall back upon later when our situation may be more critical. The overtime penalties of the Wage and Hour Law provides an important incentive to employers to begin training additional workers. The possibility of lengthening working hours forms a reservoir which we should draw upon sparingly and only as a last resort.

An editorial by Charles F. Willis, Editor of the Mining Journal, reflects, I like to think, the best opinion of the industry.

"While the person who thinks that the Wage and Hour Law, and other reform legislation, is all bunk and unnecessary may feel inclined to give as his answer, 'Repeal the whole ..... thing!!" he wrote, "we must recognize the fact that the idea of a floor for wages and a ceiling on

hours is here to stay. We can travel farther by determining among ourselves just how that principle can be retained, yet fitted to an industry that requires continuous operation in remote places.

"It is urged that those who are conducting mining operations, and who have had trouble in making the present law fit their own situation, advise the investigators of their difficulties . . . and maybe, out of the maze of facts gathered, an answer will be found whereby the mining industry can be granted the changes necessary to make the law workable. If, after cooperating and trying to find the answer and retain the principle, it still cannot be made to operate without undue hardship on both employee and employer, the remedy of repeal is still open.

"The mining industry has no quarrel or trouble with the wage provisions, as it pays far in excess of the minimum provided, but the hours provisions create many problems and inflict much hardship upon both the owners and workers in the metal mines. It is not an unsolvable problem, but can be worked out better by getting our heads together in consultation rather than butting them against each other." So wrote Mr. Willis.

I, too, feel that the principle of a floor under wages and a ceiling over hours is here to stay. I suggest, therefore, the fullest cooperation among industry, labor and the Division to bring about the achievement of its purpose.

Interpretative Bulletin

No. 13

Hours Worked

Determination of Hours for Which Employees are Entitled to Compensation under the Fair Labor Standards Act of 1938.

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Interpretative Bulletin No. 13

Determination of Hours for which Employees are Entitled to Compensation Under the Fair Labor Standards Act of 1938.

General.

1. The accurate determination of what constitutes hours worked is essential in order to establish whether the minimum wage and maximum hours requirements of section 6

and 7 of the act have been satisfied. This bulletin is intended to indicate the course which the Administrator will follow with respect to the determination of employees' hours of work in the performance of his administrative duties under the act unless he is directed otherwise by the authoritative rulings of the Courts or unless he shall subsequently decide that his interpretation is incorrect. The manner of computing minimum wages and overtime compensation which is discussed in Interpretative Bulletin No. 4 is not within the scope of this bulletin.

2. The act contains no express guide as to the manner of computing hours of work and reasonable rules must be adopted for the purposes of enforcement of the wage and hour standards. As a general rule, hours worked will include (1) all time during which an employee is required to be on duty or to be on the employer's premises or to be at a prescribed workplace, and (2) all time during which an employee is suffered or permitted to work whether or not he is required to do so. In the large majority of cases, the determination of an employee's working hours will be easily calculable under this formula and will include, in the ordinary case, all hours from the beginning of the workday to the end with the exception of periods when the employee is relieved of all duties for the purpose of eating meals.[1] The following specific problems with respect to the determination of hours worked which have been presented for our consideration are not sufficiently answered by this formula, however, and more detailed discussions of these problems are; therefore, set out in the following paragraphs.

[1] No opinion can be expressed at this time as to certain cases—e. g., employees engaged in mining or in working under high pressure—where by custom or agreement time spent eating meals is paid for as hours worked.

## Time Clocks.

3. Neither the statute nor Regulations, Part 516 (Requirements for Keeping Records) require that time clocks be used or specify the manner in which an employer has to keep a record of the number of hours worked by his employees. Time-clocks where used will be an appropriate basis for recording hours worked only when they accurately reflect the period worked by the employee. Whether or not time clocks accurately reflect the period worked by the employee is to be determined by the formula in the preceding paragraph. It should be noted also that if the employer requires the employees to punch a time clock and the employee is required to be present for a considerable period of time before doing so, such time will be considered hours worked.

## Waiting Time And Employees Subject to Call.

4. Many inquiries have been received with respect to periods of inactivity due to the break-down of machinery and time spent in waiting for materials to be furnished or waiting for the loading or unloading of railroad cars or other vehicles of transportation. Generally, the time during which an employee is inactive by reasons of interruptions in his work beyond his control should be included in computing hours worked either if the imminence of the resumption of work requires the employee's presence at the place of employment or if the interval is too brief to be utilized effectively in the employee's own interest. This result would not be affected by the fact that the employer tells his employees that they are free to leave the premises. Hours worked are not limited to the time spent in active labor but includes time given by the employee to the employer even though part of the time may be spent in idleness.

5. Many inquiries have likewise been received regarding employments, the very nature of which involve periods of inactivity for varying lengths of time. Ordinarily such periods of inactivity during which employees are on duty should be considered hours worked. Thus, for example, messenger boys who sit around in the office and wait for messages to be routed out should be considered as working not only when they are actually delivering messages but also while waiting for such messages to be assigned. Similarly, a chauffeur who is required to drive officials of a company engaged in the production of goods for commerce should be considered as working not only when he is actually driving such officials but also during the time he is obliged to hold himself in readiness to drive. In these cases the employee engages in active work intermittently, but his time is not his own while he remains conveniently available to carry out the instructions of his employer.

6. In a few occupations periods of inactivity need not be considered as hours worked even though the employee is subject to call. The answer will generally depend upon the degree to which the employee is free to engage in personal activities during periods of idleness when he is subject to call and the number of consecutive hours that the employee is subject to call without being required to perform active work—i. e., the frequency with which the employee is called upon to engage in work. In these cases, the nature of the employee's work involves long periods of inactivity which the employee may use for uninterrupted sleep, to conduct personal business affairs, to carry on a normal routine of living, etc. A good example of this is the employee of a small telephone exchange operating a switchboard located in the employee's house. During the night no one is in direct attendance at the switchboard and an alarm bell awakens the operator if a subscriber wishes to make a telephone call. The operator has her bed alongside the switchboard and is able to get several hours of

uninterrupted sleep every night, as experience over a considerable period of time may often demonstrate. Thus, if over a period of several months a telephone operator has been called upon to answer only a few calls between the hours of 12 and 5 in the morning a segregation of such hours from hours worked will probably be justified.

7. In some cases employees are engaged in active work for part of the day but because of the nature of the job are also required to be on call for 24 hours a day. Thus, for example, a pumper of a stripper well often resides on the premises of his employer. The pumper engages in oiling the pump each day and doing any other necessary work around the well. In the event that the pump stops (at any time during the day or night) the pumper must start it up again. Similarly, caretakers, custodians, or watchmen of lumber camps during the off season when the camp is closed, live on the premises of the employer, have a regular routine of duty but are subject to call at any time in the event of an emergency. The fact that the employee makes his home at his employer's place of business in these cases does not mean the employee is necessarily working 24 hours a day. In the ordinary course of events, the employee has a normal night's sleep, has ample time in which to eat his meals, and has a certain amount of time for relaxation and entirely private pursuits. In some cases the employee may be free to come and go during certain periods. Thus, here again the facts may justify the conclusion that the employee is not working at all times during which he is subject to call in the event of an emergency, and a reasonable computation of working hours in this situation will be accepted by the Division.

8. In some cases employees may be subject to call after the completion of their regular working day; employees may be called upon after regular hours to furnish emerg-

ency service to customers. If the employee is required to remain on call in or about the place of business of the company, the time spent should be considered hours worked. If, on the other hand, the employee is merely required to leave word where he can be reached in the event of a call and is not tied down to any particular place, such time need not ordinarily be considered hours worked. The employee, however, should be considered as working at any time during which he is actually making a call and his hours worked would include all time traveling to and from such a call.

Travel Time.

9. The problem of travel time, in relation to hours worked, arises in a great variety of situations and no precise mathematical formula will provide the answer in every case. The question is often one of degree; if the time spent by an employee in traveling is reasonably to be described as "all in a day's work," such time should be considered hours worked under the act.

10. As a general rule it may be stated that an employee should treat time spent by an employee during regular working hours in traveling pursuant to the employer's instructions as hours worked. If an employer requests his employee to do a job during regular working hours which required the employee to leave the place of business the traveling time of the employee should be included in hours worked, and this is true whether or not the particular job is within the employee's regular duties.

11. In many cases travel time outside of regular working hours is considered "part of the day's work" and, accordingly, should be treated as hours worked. Thus, an employee whose normal working day extends from 8 A. M. to 5 P. M. may be requested by his employer at 5 P. M.

to make one more outside call which involves 2 hours of traveling time (to get to the place where the work is to be performed and report back to the office) and active labor of 1 hour. In such case the employer may not disregard the travel time in computing the number of hours worked by the particular employee; the employee's working day would extend from 8 a. m. to 8 p. m. In this case the employee engages in active labor for his employer after the close of his regular working day and prior to the commencement of his next regular working day, and his activities between 5 p. m. and 8 p. m. are, under the circumstances, reasonably to be considered as a continuation or extension of his normal working day. The same results, of course, would be reached if the employer requested his employee to report for work 2 hours earlier in the morning in order to make the one extra call.

12. If a crew of workers is required to report for work at a designated place at a specified hour and all the employees are then driven to the place where they are to perform work, the time spent in riding to such place should be considered hours worked. Similarly, the time spent returning from the place at the close of the day's work should be considered hours worked. In some cases, however, the employer requests his employees to report for work at a specified hour at the place where the work is to be performed instead of at the employer's place of business. In these cases the employee's working time may be considered to begin at the time he reports for work, unless the traveling time required in order to reach the place where the productive work is to be performed is unreasonably disproportionate to the normal traveling time required in reporting for work at the headquarters of the employer. No precise formula will solve this type of situation. What is unreasonably disproportionate depends upon the facts in the particular case and reasonable stand-

ards agreed upon between the employer and employee will be accepted for purposes of the act.

13. In some cases an employee is required to travel continuously for more than a full working day during which time the employee is not engaged in actual productive work for his employer. For example, an employee whose regular working hours extend from 8 a. m. to 5 p. m. may be required to spend 2 or 3 days and nights of continuous travel to reach a place where he is to perform assigned work. In such case, as indicated generally in paragraph 10, time spent traveling during the regular working hours should be considered hours worked. Travel time outside of regular working hours need not ordinarily be considered hours worked. If, however, the employee is required to travel on Saturdays, Sundays, and holidays, he should be considered as working on those days for the number of traveling hours between his established starting and stopping time on other days of the week. In determining whether the foregoing is applicable, factors such as the length of time required to reach the place where the assigned work is to be performed, whether the employee is given adequate time for sleeping and relaxation, the time that the employee is required to report for actual productive labor, etc., are very important.

14. Inquiries have been received with respect to employees who are required to travel continuously for several days and who perform active labor while traveling. Thus, for example, when cattle or poultry, etc., are sent to market by rail, an employee of the shipper is required to travel on the train in order to water and feed the stock en route. In other cases an employer who ships machinery by train to a distant customer requires an employee to oil the machinery en route and otherwise to see that it arrives in perfect condition. The employee generally rides in the caboose with the train crew. In each of

the foregoing cases, the employees are subject to call for 24 hours a day, but time required for active work by such employees would ordinarily be much less. The employee generally has a substantial amount of time for sleeping, eating, relaxation, etc.[2] No precise formula will decide this type of case and any reasonable agreement entered into between the parties or established by custom and usage which takes into account the amount of time required for active labor by the employee and the fact that the employee is subject to call for 24 hours a day, will be respected by this Division in its enforcement policy.

## Meetings, Lectures and Training Programs.

### I. General.

15. If the following four criteria are met, the time spent in attending meetings and lectures need not be considered hours worked: (1) Attendance on the part of the employee is in fact voluntary (attendance will not be considered voluntary if a condition of the employee's continued employment in his present job is attendance at the meeting or lecture); (2) the employee does not produce any goods or perform any other productive work during such meeting or lecture; (3) the meeting or lecture is given outside of regular working hours; and (4) the meeting or lecture is not directly related to the employee's work. (With respect to this last criterion, a meeting or lecture will not generally be considered directly related to the employee's work unless such meeting or lecture may reasonably be considered part of his job. Obviously, attendance at a picnic or to participate in an athletic contest would not be considered directly related to the employee's work. On the other hand, meetings and lectures

[2] The question is obviously one of degree. No opinion is expressed in the case of the relief truck driver. As to the exemption provided by sec. 13 (b) (1) from the hours provision of the act, see Interpretative Bulletin No. 9.

for the purpose of teaching the employee mine rescue or fire prevention and control do seem directly related to the employee's work.)

II. Specific Situations.

The following is a discussion of the applicability of these general criteria to specific situations:

A. Industrial Training Programs. With respect to industrial training programs, it is our opinion that time spent in attendance at industrial training courses need not be considered hours worked if (1) attendance on the part of the employee is in fact voluntary, (2) the employee does not produce any goods or perform any other productive work during such periods of training, (3) the training course is given outside of regular working hours and (4) the training course is intended to train the employee to a new, different or additional skill, and is not intended to make the employee more efficient at doing what he has been doing in his present job. The last condition (4) is not a departure from the general criterion mentioned in the preceding paragraph that the meeting or lecture must not be directly related to the employee's work. Rather, this condition is merely intended to indicate specifically how that criterion operates with respect to industrial training programs. In other words, in the case of industrial training programs, the programs will not be considered directly related to the employee's work if the training course trains the employee to a new, different or additional skill.

A few examples will serve to show the distinction between those industrial training programs, attendance at which will be deemed hours worked, and those programs, attendance at which will *not* be deemed hours worked:

(1) One example is that of a welder who is working in an automobile plant welding steel automobile frames. The employer has accepted an order for airplane fuselages, in the construction of which employees having the skill to weld aluminum will be required. The employer gives to any welder in his organization the opportunity, if he chooses, to take a course after working hours in welding aluminum. In such course no finished product is made, but the end product of the welding is scrapped. There is provision that if the welder does not acquire this higher skill he shall be permitted to continue to be a welder working for the employer on steel automobile frames.

(2) Another example is that of a typist. An expansion of the plant gives opportunity for stenographers. The employer offers to any of his typists who choose an opportunity after work to be trained for stenographic work. Such training is not made a condition of their continuing as typists and no regular office work is done for the employer during the training period.

(3) Another example is the case of a punch press operator who knows that his employer will install drop forging machines, employment in the operation of which will yield a higher rate of pay. The employer offers a certain number of punch press operators and employees in other skills an opportunity after work to be trained on drop forging machines. The end product of the forging is scrapped. Punch press operators who do not take this course are allowed to continue in employment as punch press operators.

(4) Finally, an example of a case in which attendance at the training course must be considered hours worked is that of a sewing machine operator in a garment factory whose productivity is such that it is marginal in comparison with the median productivity of all the other sewing

machine operators. The employer says, "you are too slow and unless you practice on waste material after work and get up your productivity and speed, you cannot work here any more." This would be hours worked for two reasons: (1) attendance would not be voluntary, and (2) the employee would not be learning a new, additional or different skill.

These examples point out the underlying purpose of the four conditions which must be met if attendance at the training course is not to be considered hours worked. Such purpose is to prevent exploitation of labor in violation of the act by using alleged training programs to effect a stretchout or speed-up in the work of employees in their present position. The program to satisfy the four criteria must essentially be for the purpose of providing better employment by adding skills primarily for the benefit of the employee, although, of course, the program would also benefit the employer by providing him with certain skills in which his labor market is deficient.

B. *Attendance at public schools, recognized universities or other bona fide institutions of learning.* In some cases employees attend public schools or take regular courses in a recognized university or other bona fide institution of learning. The courses given are part of a standard curriculum and are not designed to accomodate the requirements of any particular plant. Thus, for example, a teller in a bank may take a university course on the financial policy of corporations, or a mechanic in a factory may take a course in draftsmanship or physics. In these cases the subject matter of the course impinges on the general subject matter of the employee's job and makes him more versatile and better qualified to assume additional responsibility. The instruction, however, has no necessary and immediate relation to the particular work done by the employee and he does not, of course, engage in any pro-

ductive work for the employer during time spent taking this course. In our opinion time spent by an employee outside regular working hours in attending lectures at, or in studying correspondence given by, a public school, or university, or other bona fide institution of learning (even if the employer pays the necessary tuition) will not be considered "directly related to the employee's work" and, if attendance is voluntary, need not be considered hours worked.

C. *Safety meetings.* Safety meetings which take place outside working hours and are conducted, sponsored, or otherwise approved by a governmental agency (state or federal) or by any recognized independent or other bona fide organization engaged primarily in disseminating safety information, will not be considered "directly related to the employee' work." Furthermore, even if the safety meeting is not so conducted, sponsored, or approved, it will not be considered "directly related to the employee's work" if it is conducted outside working hours as part of a general safety program which is not restricted to the hazards of the job at hand or to the personal responsibilities of employees in doing their job safely and efficiently. Accordingly, voluntary attendance at such meetings need not be considered hours worked.

III. Apprenticeship training.

In view of the special circumstances involved in bona fide apprenticeship training, it is our opinion that time spent in related supplemental instruction by a bona fide apprentice—one who is employed under a written apprenticeship agreement which meets the standards of the Federal Committee on Apprenticeships or which conforms substantially with such standards—need not be considered hours worked if the written apprenticeship agreement so provides. Bona fide apprenticeship programs involve

consideration of public policy not present in the case of the ordinary employer-employee relationship. They are intended to provide the community with an adequate number of journeymen who have had a combination of practical experience and theoretical instruction and thus to enchance employability. The comprehensive program of practical training covering an entire trade is supplemented by theoretical instruction designed to give the apprentice a better understanding of the mechanical activities which he will be called upon to perform in his trade. It should be noted, however, that related supplemental instruction does not include time spent by an apprentice in performing his regular duties or in any active work. Such time should be considered hours worked under all circumstances.

Employees Having More Than One Job.

16. Many inquiries have been received with respect to employees who work for two or more companies. Thus, for example, company A and company B may arrange to employ a common watchman, the employee having the duty of watching the property of both companies concurrently for a specified number of hours each night. In this case A and B are not each required to pay the minimum rate required under the statute for all hours worked by the watchman (i. e., 30 cents an hour each) but A and B should be considered as a joint employer for purposes of the act.

17. In some cases, however, an employee may work 40 hours for company A and 15 additional hours during the same week on a different job for company B. In this case it would seem that if A and B are acting entirely independently of each other with respect to the employment of the particular employee, both A and B, in ascertaining their obligations under the act, would be privileged to dis-

regard all work performed by the employee of the other company. If, on the other hand, the employment by A is not completely disassociated from the employment by B, the entire employment of the employee for both A and B should be considered as a whole for the purposes of the statute. Whether the employment by A and B are completely disassociated depends, of course, upon the facts in the particular case. This Division will scrutinize all cases involving more than one employment and, at least in the following situations, an employer will be considered as acting in the interest of another employer in relation to an employee: If the employers make an arrangement for the interchange of employees or if one company controls, is controlled by, or is under common control with, directly or indirectly, the other company.

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## OBJECTIONS TO WRITTEN INTERROGATORIES UPON WHICH PLAINTIFFS PROPOSE TO TAKE DEPOSITIONS.

411 (Civil Actions Nos. 5232, 5233 and 5234.)

Comes now Philip B. Fleming, Administrator of the Wage and Hour Division, United States Department of Labor, intervener in these cases, and objects to written interrogatories hereinafter enumerated upon which plaintiffs propose to take the depositions of L. C. Gunter, of Knoxville, Tennessee, and as grounds for his objection states the following:

(1) Intervener objects to so much of Interrogatory 4 as asks for information respecting the witnesses' experience in the production or mining of coal upon the grounds that such evidence is immaterial and irrelevant and does not bear upon the issues of these cases.

(2) Intervener objects to Interrogatory 5 upon the following grounds:

(a) Said question is vague and indefinite.

(b) Said question does not indicate to what industries said collective bargaining negotiations or agreements referred to therein relate.

(c) Said question does not indicate with whom United Mine Workers of America or other labor organizations negotiated or entered into any collective bargaining agreements.

(d) Said question does not specify any particular period of time.

(e) Said question calls for information of which contracts or other written memoranda will be the best evidence.

(f) Said question calls for information which is the result of hearsay.

(3) Intervener objects to Interrogatory 6(a) on the grounds that the general custom and practice in coal mines or in the coal industry are immaterial and irrelevant and do not bear upon the proper issues of these cases.

(4) Intervener objects to Interrogatory 6(b) on the grounds that the general custom and practice in coal mining or in the coal industry are irrelevant and immaterial and do not bear upon the proper issues of these cases and said interrogatory is a repetition of Interrogatory 6(a).

(5) Intervener objects to Interrogatory 6(c) on the ground that it calls for information which is immaterial

and irrelevant and does not bear upon the proper issues of these cases.

(6) Intervener objects to Interrogatory 6(d) on the grounds that said question calls for information which is immaterial and irrelevant and does not bear upon the proper issues of these cases.

(7) Interrogatory 7(a) is objectionable upon the following grounds:

(a) The said question is vague and indefinite in that it does not specify which branch of the mining industry is referred to or the mining of what minerals is referred to.

(b) It does not relate to any particular period of time.

(c) It calls for evidence of which contracts or other written documents will be the best evidence.

(8) Interrogatory 7(b) is objected to upon the ground that it calls for information of which written documents will be the best evidence.

(9) Interrogatory 7(c) is objectionable on the ground that it calls for copies of documents of which the originals would be the best evidence, and for evidence of which written documents would be the best evidence.

(10) Interrogatory 8 is objectionable upon the following grounds:

(a) It is vague and indefinite in that it does not specify the industry to which it is directed and as to which information is sought.

(b) It calls for a conclusion of law as to what is the place of work, which this Court must determine.

(c) It calls for information of which written documents are the best evidence.

(11) Interrogatory 9(a) is objectionable upon the following grounds:

(a) The information called for is immaterial and irrelevant.

(b) The question is vague and indefinite in that it does not specify what mine or what type of minerals are produced in the mines referred to.

(c) It contains within it a statement of fact, of which no proof has been adduced.

(12) Interrogatory 9(c) (sic) is objectionable upon the same grounds as Interrogatory 9(a).

(13) Interrogatory 10(a) is objectionable upon the following grounds:

(a) It calls for information which is immaterial and irrelevant.

(b) It is vague and indefinite in that it does not particularize the mine as to which information is sought, the type of minerals produced and the period of time covered by said question.

(c) It calls for a conclusion as to what is the working place, which is the question to be determined by this Court.

(d) It calls for information which is the result of hearsay.

(14) Interrogatory 10(b) is objectionable upon the following grounds:

(a) It calls for information which is the result of hearsay.

(b) It is a leading question.

(c) It is vague and indefinite.

(15) Interrogatory 10(c) is objectionable upon the following grounds:

(a) It is vague and indefinite.

(b) It calls for information which is the result of hearsay.

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Served by handing a copy of the foregoing to: Benners, Burr, McKamy & Forman, Brown Marx Building, Birmingham, Alabama; and a copy to Bradley, Baldwin, All & White, Comer Building, Birmingham, Alabama, this 1st day of July, 1941.

JEROME A. COOPER.

Filed July 1, 1941.

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OBJECTIONS TO WRITTEN INTERROGATORIES UPON WHICH PLAINTIFFS PROPOSE TO TAKE DEPOSITIONS.

415 (Civil Actions Nos. 5232, 5233 and 5234.)

Comes now Philip B. Fleming, Administrator of the Wage and Hour Division, United States Department of Labor, intervener in these cases, and objects to written interrogatories hereinafter enumerated upon which plaintiffs propose to take the depositions of D. C. Kennedy of Charleston, West Virgina, and as grounds for his objections states the following:

(1) Intervener objects to so much of Interrogatory 4 as asks for information respecting witnesses' experience in the production or mining of coal upon the grounds that such evidence is immaterial and irrelevant and does not bear upon the issues of these cases.

(2) Intervener objects to Interrogatory 5 upon the following grounds:

(a) Said question is vague and indefinite.

(b) Said question does not indicate to what industries said collective bargaining negotiations or agreements referred to therein relate.

(c) Said question does not indicate with whom United Mine Workers of America of other labor organizations negotiated or entered into any collective bargaining agreements.

(d) Said question does not specify any particular period of time.

(e) Said question calls for information of which contracts or other written memoranda will be the best evidence.

(f) Said question calls for information which is the result of hearsay.

(3) Intervener objects to Interrogatory 6(a) on the grounds that the general custom and practice in coal mines or in the Coal industry is irrelevant and immaterial and does not bear upon the proper issues of these cases.

(4) Intervener objects to interrogatory 6(b) on the grounds that the general custom and practice in coal mining or in the coal industry is irrelevant and immaterial and does not bear upon the proper issues of these cases and said interrogatory is a repetition of interrogatory 6(a).

(5) Intervener objects to Interrogatory 6(c) on the ground that it calls for information which is immaterial and irrelevant and does not bear upon the proper issues of these cases.

(6) Intervener objects to interrogatory 6(d) on the grounds that said question calls for information which is

immaterial and irrelevant and does not bear upon the proper issues of these cases.

(7) Interrogatory 7(a) is objectionable upon the following grounds:

(a) The said question is vague and indefinite in that it does not specify what branch of the mining industry is referred to or the mining of what minerals is referred to.

(b) It does not relate to any particular period of time.

(c) It calls for evidence of which contracts or other written documents will be the best evidence.

(8) Interrogatory 7(b) is objected to upon the ground that it calls for information of which written documents will be the best evidence.

(9) Interrogatory 7(c) is objectionable on the ground that it calls for copies of documents of which the originals would be the best evidence, and for evidence of which written documents would be the best evidence.

(10) Interrogatory 8 is objectionable upon the following grounds:

(a) It is vague and indefinite in that it does not specify the industry to which it is directed and as to which information is sought.

(b) It calls for a conclusion of law as to what is the place of work, which this Court must determine.

(c) It calls for information of which written documents are the best evidence.

(11) Interrogatory 9(a) is objectionable upon the following grounds:

(a) The information called for is immaterial and irrelevant.

(b) The question is vague and indefinite in that it does not specify what mine or what type of minerals are produced in the mines referred to.

(c) It contains within it a statement of fact, of which no proof has been adduced.

(12) Interrogatory 9(c) (sic) is objectionable upon the same grounds as Interrogatory 9(a).

(13) Interrogatory 10(a) is objectionable upon the following grounds:

(a) It calls for information which is immaterial and irrelevant.

(b) It is vague and indefinite in that it does not particularize the mine as to which information is sought, the type of minerals produced and the period of time covered by said question.

(c) It calls for a conclusion as to what is the working place, which is the question to be determined by this Court.

(d) It calls for information which is the result of hearsay.

(14) Interrogatory 10(b) is objectionable upon the following grounds:

(a) It calls for information which is the result of hearsay.

(b) It is a leading question.

(c) It is vague and indefinite.

(15) Interrogatory 10(c) is objectionable upon the following grounds:

(a) It is vague and indefinite.

(b) It calls for information which is the result of hearsay.

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Served by handing a copy of the foregoing to: Benners, Burr, McKamy & Forman, Brown Marx Building, Birmingham, Alabama; and a copy to Bradley, Baldwin, All & White, Comer Building, Birmingham, Alabama, this 1 day of July, 1941.

JEROME A. COOPER.

Filed July 1, 1941.

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419 OBJECTIONS TO WRITTEN INTERROGATORIES UPON WHICH PLAINTIFFS PROPOSE TO TAKE DEPOSITIONS.

(Civil Actions Nos. 5232, 5233 and 5234.)

Comes now Philip B. Fleming, Administrator of the Wage and Hour Division, United States Department of Labor, intervener in these cases, and objects to written interrogatories hereinafter enumerated upon which plaintiffs propose to take the depositions of W. J. Jenkins of St. Louis, Missouri, and as grounds for his objections states the following:

(1) Intervener objects to so much of Interrogatory 4 as asks for information respecting the witnesses' experience in the production or mining of coal upon the grounds that such evidence is immaterial and irrelevant and does not bear upon the issues of these cases.

(2) Intervener objects to Interrogatory 5 upon the following grounds:

(a) Said question is vague and indefinite.

(b) Said question does not indicate to what industries said collective bargaining negotiations or agreements referred to therein relate.

(c) Said question does not indicate with whom United Mine Workers of America or other labor organizations negotiated or entered into any collective bargaining agreements.

(d) Said question does not specify any particular period of time.

(e) Said question calls for information of which contracts or other written memoranda will be the best evidence.

(f) Said question calls for information which is the result of hearsay.

(3) Intervener objects to Interrogatory 6(a) on the grounds that the general custom and practice in coal mines or in the coal industry are immaterial and irrelevant and do not bear upon the proper issues of these cases.

(4) Intervener objects to Interrogatory 6(b) on the grounds that the general custom and practice in coal mining or in the coal industry are irrelevant and immaterial and do not bear upon the proper issues of these cases and said interrogatory is a repetition of Interrogatory 6(a).

(5) Intervener objects to Interrogatory 6(c) on the ground that it calls for information which is immaterial and irrelevant and does not bear upon the proper issues of these cases.

(6) Intervener objects to Interrogatory 6(d) on the grounds that said question calls for information which is immaterial and irrelevant and does not bear upon the proper issues of these cases.

(7) Interrogatory 7(a) is objectionable upon the following grounds:

(a) The said question is vague and indefinite in that it does not specify which branch of the mining industry is referred to or the mining of what minerals is referred to.

(b) It does not relate to any particular period of time.

(c) It calls for evidence of which contracts or other written documents will be the best evidence.

(8) Interrogatory 7(b) is objected to upon the ground that it calls for information of which written documents will be the best evidence.

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(a) The information called for is immaterial and irrelevant.

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(13) Interrogatory 10(a) is objectionable upon the following grounds:

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(b) It is vague and indefinite in that it does not particularize the mine as to which information is sought, the type of mineral produced and the period of time covered by said question.

(c) It calls for a conclusion as to what is the working place, which is the question to be determined by this Court.

(d) It calls for information which is the result of hearsay.

(14) Interrogatory 10(b) is objectionable because upon the following grounds:

(a) It calls for information which is the result of hearsay.

(b) It is a leading question.

(c) It is vague and indefinite.

(15) Interrogatory 10(c) is objectionable upon the following grounds:

(a) It is vague and indefinite.

(b) It calls for information which is the result of hearsay.

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JEROME A. COOPER.

Filed July 1, 1941.

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MOTION OF PHILIP B. FLEMING, ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, U. S. DEPARTMENT OF LABOR, OBJECTING TO ANSWERS TO INTERROGATORIES AND A MOTION FOR CONTINUANCE OF DATE OF TRIAL.

(Civil Actions Nos. 5232, 5233 and 5234.)

Now comes Philip B. Fleming, Administrator of the Wage and Hour Division, United States Department of Labor, intervener in these cases, and objects to the answers to the interrogatories hereinafter enumerated on the following grounds:

(1) Intervener objects to the answer filed and served by Plaintiff Tennessee Coal Iron & Railroad Company to Interrogatory XXVI on the ground that said answer is not responsive to the interrogatory and does not comply with the order of the Court directing that plaintiff answer said interrogatory.

(2) Intervener objects to the answers filed by all plaintiffs to Interrogatory XXVII on the grounds that said answers are not responsive to the said interrogatory and do not comply with the order of this Court directing plaintiffs to answer said interrogatory.

Intervener moves for a continuance of the trial of these cases on the ground that he has been prejudiced in his preparation for the trial thereof by the failure and refusal of the plaintiffs to answer responsively and fully the said interrogatories hereinabove referred to and comply with said order of this Court. Intervener avers that as a result of the order of this Court directing that he be not permitted to take oral depositions and by the failure and refusal of the plaintiffs to answer the interrogatories hereinabove referred to and to comply with the order of the Court, he has not and will not receive the information called for, relating to one of the issues raised by the plaintiffs' complaints, in a reasonable time before the trial of these cases to make full use thereof in the preparation of his cases for trial.

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424 NOTICE OF HEARING ON OBJECTIONS AND MOTION, omitted from the printed record, pursuant to Rule 23 of this Court.

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425 ORDER SUSTAINING INTERVENER'S OBJECTIONS TO PLAINTIFFS' INTERROGATORIES.

(Civil Actions Nos. 5232, 5233, and 5234.)

This matter coming on to be heard on objections by Philip B. Fleming, Administrator of the Wage and Hour Division, United States Department of Labor, intervener in these cases, to interrogatories propounded to him by plaintiffs in the presence of counsel for plaintiffs and counsel for intervener;

And the Court having heard and considered the argument of counsel and it appearing to the Court that the interrogatories hereinafter enumerated call for information which is immaterial and irrelevant to the issues of these cases and that intervener should not be required to answer said interrogatories;

It is on this 1st day of July, 1941, Ordered that the objections of Philip B. Fleming, Administrator of the Wage and Hour Division, United States Department of Labor, intervener in these cases, to the following interrogatories propounded by plaintiffs be and the same are hereby sustained:

Interrogatory II

C.

(b)

(c)

D.

E.

(a)

(b)

(c)

(d)

(e)

H.

(a)

(b)

(c)

(d)

(e)

I.

J.

K.

L.

M.

O.

P.

Q.

Interrogatory III

A.

(a)

(b)

(c)

(d)

(e)

B.

C.

D.

Interrogatory IV

A.

(a)

B.

C.

D.

E.

F.

G.

(a)

(b)

(c)

(d)

H.

I.

J.

K.

L.

L(1)

L(2)

M.

N.

Interrogatory V

A.

(a)

(b)

(c)

(d)

(e)

B.

C.

K.

L.

M.

(a)

(b)

(c)

N.

(a)

(b)

(c)

(d)

(e)

(f)

(g)

Interrogatory VI

A.

B.

C.

D.

E.

F.

G.

Interrogatory VII

A.

B.

C.

D.

(a)

(b)

(c)

Interrogatory IX

A.

B.

C.

T. A. MURHPREE,
United States District Judge.

Filed July 3, 1941.

429 ORDER DENYING INTERVENER FLEMING THE RIGHT TO TAKE ORAL DEPOSITIONS.

(Civil Actions Nos. 5232, 5233 and 5234.)

This cause coming on to be heard on the motion of plaintiffs for an order that the oral depositions of Russell Hunt, M. H. Geisking, R. J. Working and others named in the notice of taking depositions served upon plaintiffs on June 26, 1941, shall not be taken, and said motion now being heard in open Court, all parties being present by counsel, and being duly considered by the Court, it is Ordered and Decreed by the Court that said motion be, and the same hereby is, sustained.

This the 28th day of June, 1941.

T. A. MURPHREE,
Judge.

Filed July 3, 1941.

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430 EXCEPTION TO ORDER DENYING RIGHT TO TAKE ORAL DEPOSITIONS.

(Civil Actions Nos. 5232, 5233 and 5234.)

Now comes Philip B. Fleming, Administrator of the Wage and Hour Division, United States Department of Labor, intervener in these cases, and files his exception to the order of this Court granting the motion made by the plantiffs objecting to the taking of the oral depositions of the witnesses named in the notice filed and served upon the parties hereto by intervener on June 26, 1941, and states as the ground for his exception the following:

(1) On June 23, 1941, Borden Burr, counsel for plaintiffs, Tennessee Coal, Iron & Railroad Company and Republic Steel Corporation, on behalf of all plaintiffs, moved in open Court without previous notice that depositions to be taken by intervener at Denver, Colorado, June 28, 1941, and Minneapolis, Minnesota, June 30, 1941, of which notice was mailed June 20, 1941, be not taken or that the Court direct the taking of same on written interrogatories. Upon the statement by the Court that written interrogatories would be ordered unless the dates for the taking of said oral depositions could be arranged to the satisfaction of Mr. Burr, counsel for intervener pointed out that a change of dates would not be convenient because he proposed to take additional depositions of witnesses in Birmingham, Alabama, before trial. Counsel for intervener then, June 23, 1941, conferred with Mr. Burr, who stated that other lawyers in his firm would be available to attend the taking of any depositions which intervener wished to take in Birmingham at any time prior to the trial of these actions on July 8, 1941.

(2) On June 26, 1941, intervener's notice was filed and served upon the parties hereto for the taking of oral depositions in Birmingham, Alabama, on July 2, 1941. All persons named in said notice are either officers or employees of the plaintiffs; and certain of these by admission of counsel for plaintiffs are competent to testify upon issues raised by the complaint and will be utilized as witnesses by the plaintiffs at the trial hereof. The testimony of all witnesses named in said notice is necessary to the adequate preparation by intervener of his case for trial.

(3) Intervener is denied a right granted by Rule 26(a) of the Rules of Civil Procedure permitting the taking

of depositions for the purpose of discovery or for use as evidence in the action or for both purposes.

(4) The denial by the Court of the right to take said oral depositions, particularly for the reason that some of the witnesses whom intervener desired to examine would be present in Court at the trial of the cases, denies to intervener an opportunity properly to prepare for the trial of these cases in the manner which is contemplated by and pursuant to the right conferred by the Rules of Civil Procedure.

(5) Plaintiffs, the moving parties objecting to the taking of said oral depositions, failed to make any showing that an order preventing the taking of such depositions was necessary to protect any of the parties in these cases from annoyance, embarrassment or oppression.

(6) Intervener was served with a motion objecting to the taking of said depositions on the afternoon of Friday, June 27, 1941, and to said motion was appended a notice that it would be brought on for argument on Tuesday, July 1, 1941. Said motion was granted by the Court on the morning of Saturday, June 28, 1941, at a conference called by the Court to determine whether the parties to these cases objected to any further continuance of the trial thereof, and without any previous notice by plaintiffs to intervener that the said motion would be heard at that conference on Saturday, June 28, 1941. Consequently, intervener did not have an opportunity to prepare pleadings or affidavits in support of his right to take depositions and did not have a full and fair hearing upon adequate notice on plaintiffs' motion.

Wherefore, intervener prays an exception to the order of the Court directing that such depositions be not taken.

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Washington, D. C.

State of Alabama,
County of Jefferson.

Jerome A. Cooper, being duly sworn, deposes and says that he has read the foregoing statement of exceptions and that the matters of fact therein stated are true.

JEROME A. COOPER.

Sworn to and subscribed before me this 5th day of July, 1941.

HELEN LOONEY EVANS,
Notary Public.

(Seal).

My commission expires 1 8 42.

Filed July 5, 1941.

433 AMENDED ANSWER OF PHILIP B. FLEMING, ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR, INTERVENER.

(Civil Actions Nos. 5232, 5233 and 5234.)

First Defense.

Intervener refers to, adopts and realleges in its entirety the answer previously filed herein by him.

Second Defense.

The specific propositions designated "G", "H", "I", "J", and "K", set forth in plaintiffs' amended complaint, are not material or relevant to or determinative of the proper issues of these actions.

Third Defense.

This Court has no jurisdiction over plaintiffs' amended complaint under the Federal Declaratory Judgment Act because there is no actual controversy within the meaning of the said Act, said amended complaint does not present a case or controversy within the meaning of Article III, Section 2 of the United States Constitution, plaintiffs are not threatened with or in danger of suffering any irreparable injury.

GERARD D. REILLY,
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Regional Attorney,

ABNER BRODIE,
United States Department of Labor Attorneys for Philip B. Fleming, Administrator of the Wage and Hour Division, United States Department of Labor.

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U. S. Department of Labor,
1007 Comer Building,
Birmingham, Alabama.
or
Wage and Hour Division,
U. S. Department of Labor,
Washington, D. C.

Served by handing a copy of the foregoing to Benners, Burr, McKamy and Forman, Attorneys for Tennessee Coal, Iron & Railroad Company and Republic Steel Corporation, Plaintiffs, Brown Marx Building, Birmingham, Alabama; a copy to Crampton Harris, Esq., Attorney for Muscoda Local No. 123, et als, Defendant, First National Building, Birmingham Alabama, a copy to Messrs. J. Q. Smith, Ralph W. Quinn, and W. F. Spencer, Attorneys for Muscoda Local No. 21935, et als, Defendants, Farley Building, Birmingham, Alabama; and a copy to Bradley, Baldwin, All & White, Attorneys for Sloss-Sheffield Steel & Iron Company, Plaintiff, Comer Building, Birmingham, Alabama, this 5 day of July, 1941.

JEROME A. COOPER.

Filed July 5, 1941.

435 OBJECTIONS TO WRITTEN INTERROGATORIES UPON WHICH PLAINTIFFS PROPOSE TO TAKE DEPOSITIONS.

(Civil Actions Nos. 5232, 5233 and 5234.)

Comes now Philip B. Fleming, Administrator of the Wage and Hour Division, United States Department of Labor, intervener in these cases, and objects to written interrogatories hereinafter enumerated upon which plaintiffs propose to take the depositions of Harvey Cartwright of Terre Haute, Indiana, and as grounds for his objections states the following:

(1) Intervener objects to so much of Interrogatory 4 as asks for information respecting the witness' experience in the production or mining of coal upon the grounds that such evidence is immaterial and irrelevant and does not bear upon the issues of these cases.

(2) Intervener objects to Interrogatory 5 upon the following grounds:

(3) Said question is vague and indefinite.

(b) Said question does not indicate to what industries said collective bargaining negotiations or agreements referred to therein relate.

(c) Said question does not indicate with whom United Mine Workers of America or other labor organizations negotiated or entered into any collective bargaining agreements.

(d) Said question does not specify any particular period of time.

(e) Said question calls for information of which contracts or other written memoranda will be the best evidence.

(f) Said question calls for information which is the result of hearsay.

(3) Intervener objects to Interrogatory 6(a) on the grounds that the general custom and practice in coal mines or in the coal industry are immaterial and irrelevant and do not bear upon the proper issues of these cases.

(4) Intervener objects to Interrogatory 6(b) on the grounds that the general custom and practice in coal mining or in the coal industry are irrelevant and immaterial and do not bear upon the proper issues of these cases and said interrogatory is a repetition of Interrogatory 6(a).

(5) Intervener objects to Interrogatory 6(c) on the ground that it calls for information which is immaterial and irrelevant and does not bear upon the proper issues of these cases.

(6) Intervener objects to Interrogatory 6(d) on the grounds that said question calls for information which is immaterial and irrelevant and does not bear upon the proper issues of these cases.

(7) Interrogatory 7(a) is objectionable upon the following grounds:

(a) The said question is vague and indefinite in that it does not specify which branch of the mining industry is referred to or the mining of what minerals is referred to.

(b) It does not relate to any particular period of time.

(c) It calls for evidence of which contracts or other written documents will be the best evidence.

(8) Interrogatory 7(b) is objected to upon the ground that it calls for information of which written documents will be the best evidence.

(9) Interrogatory 7(c) is objectionable on the ground that it calls for copies of documents of which the originals would be the best evidence, and for evidence of which written documents would be the best evidence.

(10) Interrogatory 8 is objectionable upon the following grounds:

(a) It is vague and indefinite in that it does not specify the industry to which it is directed and as to which information is sought.

(b) It calls for a conclusion of law as to what is the place of work; which this Court must determine.

(c) It calls for information of which written documents are the best evidence.

(11) Interrogatory 9(a) is objectionable upon the following grounds:

(a) The information called for is immaterial and irrelevant.

(b) The question is vague and indefinite in that it does not specify what mine or what type of minerals are produced in the mines referred to.

(c) It contains within it a statement of fact, of which no proof has been adduced.

(12) Interrogatory 9(c) (sic) is objectionable upon the same grounds as Interrogatory 9(a).

13. Interrogatory 10(a) is objectionable upon the following grounds:

(a) It calls for information which is immaterial and irrelevant.

(b) It is vague and indefinite in that it does not particularize the mines as to which information is sought, the type of minerals produced and the period of time covered by said question.

(c) It calls for a conclusion as to what is the working place, which is the question to be determined by this Court.

(d) It calls for information which is the result of hearsay.

(14) Interrogatory 10(b) is objectionable upon the following grounds:

(a) It calls for information which is the result of hearsay.

(b) It is a leading question.

(c) It is vague and indefinite.

(15) Interrogatory 10(c) is objectionable upon the following grounds:

(a) It is vague and indefinite.

(b) It calls for information which is the result of hearsay.

GERARD D. REILLY,
Solicitor of Labor,
IRVING J. LEVY,
Assistant Solicitor in Charge of Litigation,
JEROME A. COOPER,
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U. S. Department of Labor,
Washington, D. C.

Served by handing a copy of the foregoing to: Benners, Burr, McKamy and Forman, Brown Marx Building, Birmingham, Alabama; and a copy to Bradley, Baldwin, All & White, Comer Building, Birmingham, Alabama, this 5 day of July 1941.

JEROME A. COOPER.

Filed July 5, 1941.

439 OBJECTIONS TO WRITTEN INTERROGATORIES UPON WHICH PLAINTIFFS PROPOSE TO TAKE DEPOSITIONS.

(Civil Actions Nos. 5232, 5233 and 5234.)

Comes now Philip B. Fleming, Administrator of the Wage and Hour Division, United States Department of Labor, intervener in these cases, and objects to written interrogatories hereinafter enumerated upon which plaintiffs propose to take the depositions of Frances Keegan of Pittsburg, Kansas, and as grounds for his objections states the following:

(1) Intervener objects to so much of Interrogatory 4 as asks for information respecting the witness' experience in the production or mining of coal upon the grounds that such evidence is immaterial and irrelevant and does not bear upon the issues of these cases.

(2) Intervener objects to Interrogatory 5 upon the following grounds:

(a) Said question is vague and indefinite.

(b) Said question does not indicate to what industries said collective bargaining negotiations or agreements referred to therein relate.

(c) Said question does not indicate with whom United Mine Workers of America or other labor organizations negotiated or entered into any collective bargaining agreements.

(d) Said question does not specify any particular period of time.

(e) Said question calls for information of which contracts or other written memoranda will be the best evidence.

(f) Said question calls for information which is the result of hearsay.

(3) Intervener objects to Interrogatory 6(a) on the grounds that the general custom and practice in coal mines or in the coal industry are immaterial and irrelevant and do not bear upon the proper issues of these cases.

(4) Intervener objects to interrogatory 6(b) on the grounds that the general custom and practice in coal mining or in the coal industry are irrelevant and immaterial and do not bear upon the proper issues of these cases and said interrogatory is a repetition of Interrogatory 6(a).

(5) Intervener objects to Interrogatory 6(a) on the ground that it calls for information which is immaterial and irrelevant and does not bear upon the proper issues of these cases.

(6) Intervener objects to Interrogatory 6(d) on the grounds that said question calls for information which is immaterial and irrelevant and does not bear upon the proper issues of these cases.

(7) Interrogatory 7(a) is objectionable upon the following grounds:

(a) The said question is vague and indefinite in that it does not specify which branch of the mining industry is referred to or the mining of what minerals is referred to.

(b) It does not relate to any particular period of time.

(c) It calls for evidence of which contracts or other written documents will be the best evidence.

(8) Interrogatory 7(b) is objected to upon the ground that it calls for information of which written documents will be the best evidence.

(9) Interrogatory 7(c) is objectionable on the ground that it calls for copies of documents of which the originals would be the best evidence, and for evidence of which written documents would be the best evidence.

(10) Interrogatory 8 is objectionable upon the following grounds:

(a) It is vague and indefinite in that it does not specify the industry to which it is directed and as to which information is sought.

(b) It calls for a conclusion of law as to what is the place of work, which this Court must determine.

(c) It calls for information of which written documents are the best evidence.

(11) Interrogatory 9(a) is objectionable upon the following grounds:

(a) The information called for is immaterial and irrelevant.

(b) The question is vague and indefinite in that it does not specify what mine or what type of minerals are produced in the mines referred to.

(c) It contains within it a statement of fact, of which no proof has been adduced.

(12) Interrogatory 9(c) (sic) is objectionable upon the same grounds as Interrogatory 9(a).

(13) Interrogatory 10(a) is objectionable upon the following grounds:

(a) It calls for information which is immaterial and irrelevant.

(b) It is vague and indefinite in that it does not particularize the mine as to which information is sought, the type of minerals produced and the period of time covered by said question.

(c) It calls for a conclusion as to what is the working place, which is the question to be determined by this Court.

(d) It calls for information which is the result of hearsay.

(14) Interrogatory 10(b) is objectionable upon the following grounds:

(a) It calls for information which is the result of hearsay.

(b) It is a leading question.

(c) It is vague and indefinite.

(15) Interrogatory 10(c) is objectionable upon the following grounds:

(a) It is vague and indefinite.

(b) It calls for information which is the result of hearsay.

GERARD D. REILLY,
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Assistant Solicitor in Charge of Litigation,
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Washington, D. C.

Served by handing a copy of the foregoing to: Benners, Burr, McKamy & Forman, Brown Marx Building, Birmingham, Alabama; and a copy to Bradley, Baldwin, All & White, Comer Building, Birmingham, Alabama, this 5 day of July, 1941.

JEROME A. COOPER.

Filed July 5, 1941.

443 OBJECTIONS TO WRITTEN INTERROGATORIES UPON WHICH PLAINTIFFS PROPOSE TO TAKE DEPOSITIONS OF W. B. DALY.

(Civil Actions Nos. 5232, 5233 and 5234.)

Comes now Philip B. Fleming, Administrator of the Wage and Hour Division, United States Department of Labor, intervener in these cases, and objects to the written interrogatories hereinafter enumerated upon which plaintiffs propose to take the depositions of W. B. Daly, of Butte, Montana, and as grounds for his objections states the following:

1. Intervener objects to interrogatory 6 on the ground that it calls for information which is immaterial and irrelevant to the issue of these cases.

2. Intervener objects to interrogatory 8 upon the ground that it calls for a conclusion of the witness respecting what are "underground working places" which is an issue of these cases.

3. Intervener objects to interrogatory 9 upon the ground that it calls for a conclusion of the witness respecting what are "their working places" which is an issue of these cases.

4. Intervener objects to interrogatory 10 upon the ground that it asks for a conclusion of the witness respecting what are "underground working places" which is an issue of these cases.

5. Intervener objects to interrogatory 11 upon the ground that it asks for a conclusion of the witness respect-

ing what are "underground working places" which is an issue of these cases.

6. Intervener objects to interrogatory 12 for the reasons stated in his objections to interrogatories 8, 9, 10, and 11.

7. Intervener objects to interrogatory 13 upon the grounds that it is vague and indefinite and part (d) thereof calls for information which is irrelevant and immaterial.

8. Intervener objects to interrogatory 14 for the reasons stated in his objections to interrogatories 11, 12, and 13, and upon the further ground that it calls for hearsay, testimony, is vague and indefinite, and is not confined to any specific period of time.

9. Intervener objects to interrogatory 15 upon the grounds that it calls for information which is immaterial and irrelevant to the issues of these cases, and it asks for a conclusion of the witness respecting what are "underground working places" which is an issue to be determined by this Court.

10. Intervener objects to interrogatory 16 upon the ground that it asks for information which is immaterial and irrelevant to the issues of these cases, and upon the further ground that it calls for a conclusion from the witness with respect to what are "underground working places" which is an issue of these cases.

11. Intervener objects to the interrogatory 17 upon the ground that it is vague and indefinite, and upon the further grounds that it calls for hearsay testimony and for a conclusion of the witness with respect to what are "underground working places" which is an issue of these cases.

12. Intervener objects to interrogatory 18 upon the grounds that it is vague and indefinite, and calls for hear-

say testimony and for information which is immaterial and irrelevant to the issues of these cases.

13. Intervener objects to interrogatory 19(a) upon the grounds that it is vague and indefinite, that the best evidence rule requires the production of the original contracts, it calls for hearsay testimony, and it asks for a conclusion of the witness respecting what are "underground working places" which is an issue to be determined by this Court.

14. Intervener objects to interrogatory 19(b) upon the same grounds as he objects to interrogatory 19(a).

15. Intervener objects to interrogatory 20(a) upon the grounds that it calls for information which is immaterial and irrelevant, and it calls for hearsay testimony.

16. Intervener objects to interrogatory 20(b) on the grounds that it calls for information which is immaterial and irrelevant to the issues of these cases, and it asks for hearsay testimony, and for a conclusion of the witness with respect to what are "places of work" which is an issue to be determined by the Court in these cases.

17. Intervener objects to interrogatory 20(c) upon the grounds that it is vague and indefinite, it calls for a conclusion of the witness as to what is "the working place" which is an issue that this Court must determine in these cases, and it calls for hearsay testimony.

18. Intervener objects to interrogatory 21 upon the grounds that it calls for hearsay testimony and is vague and indefinite.

19. Intervener objects to interrogatory 22 upon the ground that it asks for information which is immaterial and irrelevant to the issues of these cases.

20. Intervener objects to interrogatory 23 upon the grounds that it is vague and indefinite and calls for a

conclusion of the witness respecting what is material or relevant to the issues in these cases, which is a question for the Court to determine.

21. Intervener objects to interrogatory 24 upon the ground that it asks for a conclusion of the witness with respect to what are "their working places" which is an issue to be determined by this Court.

22. Intervener objects to interrogatory 25 upon the grounds that it is vague and indefinite and calls for information which is immaterial and irrelevant to the issues of these cases.

GERARD D. REILLY,
Solicitor of Labor,
IRVING J. LEVY,
Assistant Solicitor in Charge of Litigation,
JEROME A. COOPER,
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U. S. Department of Labor,
Washington, D. C.

Seryed by handing a copy of the foregoing to: Benners, Burr, McKamy & Forman, Attorneys for Tenn. Coal, Iron & Railroad Company and Republic Steel Corp., Plaintiffs, Brown Marx Building, Birmingham, Alabama, and a copy to Bradley, Baldwin, All & White, Attorneys for Sloss-Sheffield Steel & Iron Company, Plaintiff, Comer Building, Birmingham, Alabama, this 7th day of July, 1941.

JEROME A. COOPER.

Filed July 7, 1941.

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447 OBJECTIONS TO WRITTEN INTERROGATORIES UPON WHICH PLAINTIFFS PROPOSE TO TAKE DEPOSITIONS OF J. J. CARRIGAN.

Comes now Philip B. Fleming, Administrator of the Wage and Hour Division, United States Department of Labor, intervener in these cases, and objects to the written interrogatories hereinafter enumerated upon which plaintiffs propose to take the depositions of J. J. Carrigan of Butte, Montana, and as grounds for his objections states the following:

1 Intervener objects to interrogatory 6 on the ground that it calls for information which is immaterial and irrelevant to the issue of these cases.

2. Intervener objects to interrogatory 8 upon the ground that it calls for a conclusion of the witness respecting what are "underground working places" which is an issue of these cases.

3. Intervener objects to interrogatory 9 upon the ground that it calls for a conclusion of the witness respecting what are "their working places" which is an issue of these cases.

4. Intervener objects to interrogatory 10 upon the ground that it asks for a conclusion of the witness respecting what are "underground working places" which is an issue of these cases.

5. Intervener objects to interrogatory 11 upon the ground that it asks for a conclusion of the witness respecting what are "underground working places" which is an issue of these cases.

6. Intervener objects to interrogatory 12 for the reasons stated in his objections to interrogatories 8, 9, 10, and 11.

7. Intervener objects to interrogatory 13 upon the grounds that it is vague and indefinite and part (d) thereof calls for information which is irrelevant and immaterial.

8. Intervener objects to interrogatory 14 for the reasons stated in his objections to interrogatories 11, 12 and 13, and upon the further ground that it calls for hearsay testimony, is vague and indefinite, and is not confined to any specific period of time.

9. Intervener objects to interrogatory 15 upon the grounds that it calls for information which is immaterial and irrelevant to the issues of these cases, and it asks for a conclusion of the witness respecting what are "underground working places" which is an issue to be determined by this Court.

10. Intervener objects to interrogatory 16 upon the ground that it asks for information which is immaterial and irrelevant to the issues of these cases, and upon the further ground that it calls for a conclusion from the witness with respect to what are "underground working places" which is an issue of these cases.

11. Intervener objects to interrogatory 17 upon the ground that it is vague and indefinite, and upon the further grounds that it calls for hearsay testimony and for a conclusion of the witness with respect to what are "underground working places" which is an issue of these cases.

12. Intervener objects to interrogatory 18 upon the grounds that it is vague and indefinite, and calls for hearsay testimony and for information which is immaterial and irrelevant to the issues of these cases.

13. Intervener objects to interrogatory 19(a) upon the grounds that it is vague and indefinite, that the best evidence rule requires the production of the original contracts, it calls for hearsay testimony, and it asks for a conclusion of the witness respecting what are "underground working places" which is an issue to be determined by this Court.

14. Intervener objects to interrogatory 19(b) upon the same grounds as he objects to interrogatory 19(a).

15. Intervener objects to interrogatory 20(a) upon the grounds that it calls for information which is immaterial and irrelevant, and it calls for hearsay testimony.

16. Intervener objects to interrogatory 20(b) on the grounds that it calls for information which is immaterial and irrelevant to the issues of these cases, and it asks

for hearsay testimony, and for a conclusion of the witness with respect to what are "places of work" which is an issue to be determined by the Court in these cases.

17. Intervener objects to interrogatory 20(c) upon the grounds that it is vague and indefinite, it calls for a conclusion of the witness as to what is "the working place" which is an issue that this Court must determine in these cases, and it calls for hearsay testimony.

18. Intervener objects to interrogatory 21 upon the grounds that it calls for hearsay testimony and is vague and indefinite.

19. Intervener objects to interrogatory 22 upon the ground that it asks for information which is immaterial and irrelevant to the issues of these cases.

20. Intervener objects to interrogatory 23 upon the grounds that it is vague and indefinite and calls for a conclusion of the witness respecting what is material or relevant to the issues in these cases, which is a question for the Court to determine.

21. Intervener objects to interrogatory 24 upon the ground that it asks for a conclusion of the witness with respect to what are "their working places" which is an issue to be determined by this Court.

22. Intervener objects to interrogatory 25 upon the grounds that it is vague and indefinite and calls for information which is immaterial and irrelevant to the issues of these cases.

GERARD D. REILLY,
Solicitor of Labor.
IRVING J. LEVY,
Assistant Solicitor in Charge
of Litigation.

JEROME A. COOPER,
Regional Attorney,
ABNER BRODIE,
United States Department of Labor Attorneys for Philip B. Fleming, Administrator of the Wage and Hour Division, United States Department of Labor.

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Wage and Hour Division,
U. S. Department of Labor,
Washington, D. C.

Served by handing a copy of the foregoing to: Benners, Burr, McKamy & Forman, Attorneys for Tenn. Coal, Iron & Railroad Company and Republic Steel Corp., Plaintiffs, Brown Marx Building, Birmingham, Alabama, and a copy to Bradley, Baldwin, All & White, Attorneys for Sloss-Sheffield Steel & Iron Company, Plaintiff, Comer Building, Birmingham, Alabama, this 7th day of July, 1941.

JEROME A. COOPER.

Filed July 7, 1941.

451 AMENDMENT TO COMPLAINT AS AMENDED OF PETITIONER-PLAINTIFF TENNESSEE COAL, IRON & RAILROAD COMPANY.

(Civil Action No. 5232.)

Comes plaintiff, Tennessee Coal, Iron & Railroad Company, a corporation, and amends its amended complaint (said complaint having been amended on the 19 day of June, 1941, following the filing of the answer of the intervener defendant and no responsible pleadings having been filed to said amendment) in the following separate and several particulars:

(a) It strikes from said complaint "Section V—The Opinion of the Administrator" (pages 11-18, inclusive, of complaint), including all exhibits therein referred to.

(b) It strikes from Section VI.—paragraph 1, the following words appearing in the last sentence on Page 19 thereof, namely "of either the Administrator or".

(c) It strikes from Section VI, Paragraph H thereof (page 22 of the complaint) the following words: "Referring to the 'portal to portal' opinion of the Administrator".

(d) It strikes from Section VII, Paragraph 5 thereof (page 23 of the complaint) the following words: "Which will almost inevitably follow if the plaintiff fails to comply with the present illegal and erroneous opinion of the Administrator."

(e) It strikes from Section VII, Paragraph 6 thereof (page 23 of the complaint) the following words: "If the illegal and erroneous opinion of the Administrator or the assertions of the defendants are adhered to".

(f) It strikes from Section VII, Paragraph 7 thereof (page 23 of the complaint), the following words: "In the event by reason of the Administrator's opinion and the perils of not complying therewith it feels compelled to endeavor to comply therewith."

(g) It strikes from Section VIII, Paragraph 1 thereof (page 23 of the complaint), the following words: "Of the Administrator or".

(h) It strikes from Section VIII, Paragraph C thereof (page 23 of the complaint), the following words: "Under the warning given in his opinion of March 23, 1941 (Exhibit "A" hereto attached)".

(i) It strikes from Section VIII, Subparagraph 2 of Paragraph D thereof (page 24 of the complaint), the following words: "With the opinion either of the Administrator, or".

(j) It strikes from Section VIII, Subparagraph (a) of Paragraph B thereof (page 24 of the complaint), the following words: "Opinion of the Administrator into effect". And substituting in lieu thereof the following words: "'Portal to portal' plan into effect".

(k) It strikes from Section VIII, Subparagraph (a) of Paragraph B thereof (page 24 of the complaint), the following words: "Which will probably have to be put in if the Administrator's ruling is adhered to".

(l) It strikes from Section VIII, Subparagraphs (c) and (d) of Paragraph B thereof (page 26 of the complaint).

(m) It strikes from Section IX, Paragraphs 9 and 10 thereof (page 28 of the complaint).

(n) It strikes from Section XIV, Paragraph A of the amendment to the complaint (page 2 of the amended complaint), the following words: "And the following specific propositions". It also strikes Paragraphs G, H, I, J, and K of Section XIV of the complaint as amended (pages 2 and 3 of the amended complaint).

(o) It strikes Paragraph B of Section XIV of the complaint as amended and inserts in lieu thereof the following: "Premises considered, plaintiff further petitions and prays that the Court adjudge and answer, separately and severally, each of the questions specifically set forth in paragraphs numbered 'A' to 'F', both inclusive, of Section XIV of the complaint, and that the said intervener defendant, Philip B. Fleming, as Administrator of the Wage & Hour Division, United States Department of Labor, and the said Wage & Hour Division, United States Department of Labor, or its agents and representatives, be restrained and enjoined from attempting to enforce or to threaten to enforce or attempt to administer or to threaten to administer or enforcing or administering Section 7 of said Act as against this plaintiff, or any of its representatives or employees, so as to require plaintiff or any of its representatives or employees to compute and pay for as part of the work-day of its employees in its underground metal mines any portion of the time spent by said employees or any of them in going from the portal or entrance of the mine to the usual place of the employees' work or in returning from the usual place of the employees' work to the portal of the mine, and plaintiff prays for a general declaratory judgment with reference to the questions propounded by this petition, and a judgment against the defendants, including Philip B. Fleming, as Administrator of the Wage and Hour Division, United States Department of Labor, for costs herein, and if the plaintiff be mistaken in the relief

prayed for plaintiff hereby prays for such other, further, different, and general relief as to the Court may seem just, meet, and proper, premises considered.

E. L. ALL,
BORDEN BURR,
Attorneys for Plaintiffs.

Address:
B'ham, Ala.

State of Alabama,
County of Jefferson.

This day personally appeared before me, a Notary Public in and for the State and County aforesaid, Borden Burr, who, being first duly sworn, on oath deposes and says that he is attorney and agent for the Tennessee Coal, Iron & Railroad Company, a corporation, named as plaintiff in the foregoing complaint; that as such attorney and agent he is authorized to make this affidavit; that he has read over the foregoing amendment to the complaint therein; that he is familiar with the facts as therein set forth; that said facts in said complaint as amended as therein stated are true, except where stated on information and belief, and where so stated he verily believes the same to be true.

BORDEN BURR.

Address:
B'ham, Ala.

Subscribed and sworn to before me this 7th day of July, 1941.

MARGARETTE KENNEDY,
(Seal) Notary Public.

I hereby certify that service of all of the foregoing has this day been made by personal service upon the following attorneys: J. A. Cooper, Crampton Harris, and J. Q. Smith.

This 7th day of July, 1941.

BORDEN BURR.

Filed July 7, 1941.

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AMENDMENT TO COMPLAINT AS AMENDED OF PETITIONER-PLAINTIFF SLOSS-SHEFFIELD STEEL & IRON COMPANY.

(Civil Action No. 5233.)

Now comes the plaintiff, Sloss-Sheffield Steel & Iron Company, a corporation, and by leave of Court first had and obtained, amends its complaint as amended on, to-wit the 19th day of June, 1941, by striking therefrom the following:

(1) It strikes from said complaint as amended subsection "(e)", on page 2, of Part I "Allegations of Jurisdiction."

(2) It strikes from said complaint as amended subsection "(f)", on page 2, of said Part I "Allegations of Jurisdiction."

(3) It strikes from said complaint as amended subsection 3 of Part IV "Statement of Controversy" on page 13 thereof.

(4) It strikes from said complaint as amended Part V "The Opinion of the Administrator" on pages 15-26 thereof, together with all the exhibits therein referred to.

(5) It strikes from paragraph 1 of Part VI the phrase "either the administrator or" appearing in the last sentence thereof on page 28.

(6) It strikes from Part VII "The Probability of Great If Not Irreparable Injury" the following:

(a) From paragraph 5, appearing on page 32 thereof the following:

"which will almost inevitably follow if the plaintiff fails to comply with the present illegal and erroneous opinion of the Administrator; or if in attempting to comply it is forced to insist on a reduction of the compensation now being paid its underground employees."

(b) From paragraph 6, appearing on pages 32-33 thereof, the following:

"if the illegal and erroneous opinion of the Administrator or the assertions of the defendants are adhered to."

(c) From paragraph 7, appearing on page 33 thereof, the following:

"in the event by reason of the Administrator's opinion and the perils of not complying therewith it feels compelled to endeavor to comply therewith."

(7) It strikes from Part VIII "Perils of Decision" the following:

(a) From paragraph 1, appearing on page 33 thereof, the following:

(b) From paragraph 1 C, appearing on page 34 thereof, the following phrase

"under the warning given in his opinion of March 23, 1941 (Exhibit A hereto attached).

(c) From paragraph 2 appearing on page 34 thereof, the following phrase:

"with the opinion either of the Administrator, or".

(d) Paragraph 2 B, appearing on pages 35-37 thereof, in its entirety.

(8) From part XIV as added by the said amendment dated 19th day of June, 1941, plaintiff strikes the following:

(a) From paragraph A thereof the phrase "and the following specific propositions".

(b) Paragraphs G, I, I, J, and K of said part XIV in their entirety.

(c) Paragraph B of said part XIV in its entirety.

(9) Plaintiff inserts in lieu of said paragraph B of part XIV as originally added by the amended complaint dated June 19th, 1941, the following:

"Premises considered, plaintiff further petitions and prays that the Court adjudge and answer, separately and severally, each of the questions specifically set forth in paragraphs numbered 'A' to 'F', both inclusive, of Section XI of the complaint, and that the said intervener defendant, Philip B. Fleming, as Administrator of the Wage and Hour Division, United States Department of Labor, and the said Wage & Hour Division, United States Department of Labor, or its agents and representatives, be restrained and enjoined from attempting to enforce or to threaten to enforce or attempt to administer or to threaten to administer or enforcing or administering Section 7 of

said Act as against this plaintiff, or any of its representatives or employees, so as to require plaintiff or any of its representatives or employees to compute and pay for as part of the work-day of its employees in its underground metal mines any portion of the time spent by said employees or any of them in going from the portal or entrance of the mine to the usual place of the employees' work or in returning from the usual place of the employees' work to the portal of the mine, and plaintiff prays for a general declaratory judgment with reference to the questions propounded by this petition, and a judgment against the defendants, including Philip B. Fleming, as Administrator of the Wage & Hour Division, United States Department of Labor, for costs herein, and if the plaintiff be mistaken in the relief prayed for plaintiff hereby prays for such other, further, different, and general relief as to the Court may seem just, meet and proper, premises considered."

ERNEST L. ALL,
BORDEN BURR,
Attorneys for Plaintiffs.

State of Alabama,
Jefferson County.

This day personally appeared before me, a Notary Public in and for the State and County aforesaid, Ernest L. All, who, being first duly sworn, on oath deposes and says that he is attorney and agent for the Sloss-Sheffield Steel & Iron Company, a corporation, named as plaintiff in the foregoing complaint; that as such attorney and agent he is authorized to make this affidavit; that he has read over the foregoing amendment to the complaint therein; that he is familiar with the facts as therein set forth; that said facts in said complaint as amended as therein stated are true, except where stated

on information and belief, and where so stated he verily believes the same to be true.

ERNEST L. ALL.

Address: Birmingham, Alabama.

Subscribed and sworn to before me, on this the 7th day of July, 1941.

MARGARETTE KENNEDY,
Notary Public.

(Seal)

A copy of the foregoing amendment to complaint, as amended was on this the 7th day of July, 1941, mailed to Jerome A. Cooper, Attorney of Record for Phifip B. Fleming, Administrator, and a copy mailed to J. Q. Smith, Attorney of Record for the defendant Muscoda Local No. 21935, and other defendants affiliated with the A. F. of L. and Crampton Harris, Attorney of Record for the defendant Muscoda Local No. 123 and other defendants affiliated with the CIO.

B. A. MONAGHAN,
Of Counsel for Plaintiffs.

Filed July 7, 1941.

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AMENDMENT TO COMPLAINT AS AMENDED OF PETITIONER-PLAINTIFF REPUBLIC STEEL CORPORATION.

460 (Civil Action No. 5234.)

Comes plaintiff, Republic Steel Corporation, a corporation, and amends its amended complaint (said complaint have been amended on the 19 day of June, 194 ollowing the filing of the answer of the intervener defendant

and no responsive pleadings have been filed to said amendment) in the following separate and several particulars:

(a) It strikes from said complaint "Section V—The Opinion of the Administrator" (pages 13-26, inclusive, of complaint), including all exhibits therein referred to.

(b) It strikes from Section VI, Paragraph 1 thereof, the following words appearing on page 28 of the complaint, namely, "either the Administrator or of".

(c) It strikes from Section VI, Paragraph 2 thereof, page 31 of the complaint, the following words: "referring to the 'portal to portal' opinion of the Administrator".

(d) It strikes from Section VII, Paragraph 4 thereof, page 32 of the complaint, the following words: "to comply with the present illegal and erroneous opinion of the Administrator", and substitutes in lieu thereof the words: "to comply with the 'portal to portal' plan".

(e) It strikes from Section VII, Paragraph 5 thereof, page 32 of the complaint, the following words: "by reason of the Administrator's opinion and".

(f) It strikes from Section VIII, Paragraph 1 thereof, page 33 of the complaint, the following words: "either of the Administrator or".

(g) It strikes from Section VII Subparagraph (c) of Paragraph 1, page 33 of the complaint, and inserts in lieu thereof the following words: "To be proceeded against by injunction proceedings under Section 17 of the Act and the prevention of the shipment in interstate commerce of its manufactured goods."

(h) It strikes from Section VIII, Paragraph 2 thereof, page 34 of the complaint, the following words: "with the opinion either of the Administrator, or".

(i) It strikes from Section VIII, Subsection (d) of Paragraph 2 thereof, page 35 of the complaint, the following words: "of putting the opinion of the Administrator", and substitutes therefor the following words: "of putting the 'portal to portal' plan".

(j) It strikes from Section VIII, Subsection (1) of Section B of Paragraph 2 thereof, page 35 of the complaint.

(k) It strikes from Section VIII, Subsection (2) of Section B of Paragraph 2 thereof, page 35 of the complaint, the following words: "with the opinion of the Administrator without exceeding forty hours per workweek", and substituting therefor the following words: "with the assertions of the defendants".

It strikes from Subsection (2), also, the following words: "with the Administrator's opinion", and substitute in lieu thereof the following words: "with the 'portal to portal' plan".

(l) It strikes from Section IX, paragraph 4 on page 37 of the complaint.

(m) It strikes from Section IX, paragraph 5 on page 38 of the complaint.

(n) It strikes from Section XIV, Paragraph A of the amendment to the complaint (page 2 of the amended complaint), the following words: "And the following specific propositions". It also strikes Paragraphs G, H, I, J, and K of Section XIV of the complaint as amended pages 2 and 3 of the amended complaint).

(o) It strikes Paragraph B of Section XIV of the complaint as amended and inserts in lieu thereof the following: "Premises considered, plaintiff further petitions and prays that the Court adjudge and answer, separately and severally, each of the questions specifically set forth in paragraphs numbered 'A' to 'F', both inclusive, of Section XIV of the complaint, and that the said intervener defendant, Philip B. Fleming, as Administrator of the Wage and Hour Division, United States Department of Labor, and the said Wage and Hour Division, United States Department of Labor, or its agents and representatives, be restrained and enjoined from attempting to enforce or to threaten to enforce or attempt to administer or to threaten to administer or enforcing or administering Section 7 of said Act as against this plaintiff, or any of its representatives or employees, so as to require plaintiff or any of its representatives or employees to compute and pay for as part of the work-day of its employees in its underground metal mines any portion of the time spent by said employees or any of them in going from the portal or entrance of the mine to the usual place of the employees' work or in returning from the usual place of the employees' work to the portal of the mine, and plaintiff prays for a general declaratory judgment with reference to the questions propounded by this petition, and a judgment against the defendants, including Philip B. Fleming, as Administrator of the Wage and Hour Division, United States Department of Labor, for costs herein, and if the plaintiff be mistaken in the relief prayed for plaintiff hereby prays for such other, further, different, and general relief as to the Court may seem just, meet, and proper, premises considered.

E. L. ALL,
BORDEN BURR,
Attorneys for Plaintiffs.

Address: Birmingham, Alabama.

State of Alabama,
Jefferson County.

This day personally appeared before me, a Notary Public in and for the State and County aforesaid, Borden Burr, who, being first duly sworn, on oath deposes and says that he is attorney and agent for the Republic Steel Corporation, a corporation, named as plaintiff in the foregoing complaint; that as such attorney and agent he is authorized to make this affidavit; that he has read over the foregoing amendment to the complaint therein; that he is familiar with the facts as therein set forth; that said facts in said complaint as amended as therein stated are true, except where stated on information and belief, and where so stated he verily believes the same to be true.

BORDEN BURR.

Address: Birmingham, Alabama.

Subscribed and sworn to before me this 7th day of July, 1941.

MARGARETTE KENNEDY,
Notary Public.

(Seal)

I hereby certify that service of all of the foregoing has this day been made by personal service upon the following attorneys: J. A. Cooper, Crampton Harris, and J. Q. Smith.

This 7th day of July, 1941.

BORDEN BURR.

Filed July 7, 1941.

464 ORDER CONSOLIDATING FOR TRIAL.

(Civil Actions Nos. 5232, 5233 and 5234.)

It appearing to the Court that the above-entitled actions involve common questions of law and fact, and all parties to each of them having consented thereto, and it appearing to the Court said action should be consolidated for trial; and for good cause shown:

It is hereby Ordered by the Court that the above-entitled actions be and the same are hereby consolidated for trial only.

Done this 7th day of July, 1941.

T. A. MURPHREE,
United States District Judge.

Filed July 7, 1941.

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465 MOTION FOR ORDER TO PERMIT ENTRY.

(Civil Actions Nos. 5232, 5233 and 5234.)

Comes Philip B. Fleming, Administrator of the Wage and Hour Division, United States Department of Labor, intervener in these cases, and moves the Court, pursuant to Rule 34 of Rules of Civil Procedure as follows:

For an order requiring plaintiffs, Tennessee Coal, Iron & Railroad Company, Sloss-Sheffield Steel & Iron Company, and Republic Steel Corporation, to permit entries into their mines named in their complaints filed herein for the purpose of inspecting, photographing, making tests

of air conditions, and the taking of dust counts in said mines.

Intervener shows the Court that said entries are sought for an industrial hygienist, who is an engineer connected with the Bureau of Standards of the United States Department of Labor, and for a senior industrial economist of the Research and Statistical Branch of the United States Department of Labor.

Respectfully submitted,

GERARD D. REILLY,
Solicitor of Labor,
IRVING J. LEVY,
Assistant Solicitor in Charge of Litigation,
JEROME A. COOPER,
Regional Attorney,
ABNER BRODIE,
United States Department of Labor Attorneys for Philip B. Flemming, Administrator of the Wage and Hour Division, United States Department of Labor.

Post Office Address:
Wage and Hour Division,
U. S. Department of Labor,
1007 Comer Building,
Birmingham, Alabama,
or
Wage and Hour Division,
U. S. Department of Labor,
Washington, D. C.

Served by handing a copy of the foregoing to: Benners, Burr, McKamy & Forman, Attorneys for Tenn. Coal,

Iron & Railroad Company and Republic Steel Corp., Plaintiffs, Brown-Marx Building, Birmingham, Alabama, and a copy to Bradley, Baldwin, All & White, Attorneys for Sloss-Sheffield Steel & Iron Company, Plaintiff, Comer Building, Birmingham, Alabama, this 8 day of July, 1941.

JEROME A. COOPER.

Filed July 8, 1941.

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ORDER GRANTING MOTION TO VIEW PREMISES.

467 (Civil Actions Nos. 5232, 5233 and 5234.)

This matter having come on to be heard in the presence of all parties, on motion of Philip B. Fleming, Administrator of the Wage and Hour Division, United States Department of Labor, intervener, in which defendants join, and the Court having heard counsel for all parties,

It Is Ordered that two representatives to be selected by the said Philip B. Fleming be, and they are hereby permitted to enter each and all of the mines mentioned in the complaints, and that they be permitted to take photographs, make dust counts; said entries into the mines to be on the ordinary conveyances used to lower ore miners and at the regular time of lowering men into and hauling them out of said mines. The inspection trips are scheduled as follows:

Sloss-Sheffield Red Ore Mine, Numbers 1 and 2—July 9, 1941.

Representing Company: T. E. Costner, General Superintendent, J. W. Russell, Mine Superintendent and Engineer, A. C. Keily, Photographer. "

Representing C. I. O.: John Hill.

Representing Government: Geo. S. Wheeler, Senior Economist. J. S. Rogers, Industrial Hygienist.

Tennessee Coal, Iron & Railroad Company, Muscoda No. 4—July 10, 1941.

Representing Company: J. C. Guyton, Works Industrial Engineer, W. C. McKenzie, Muscoda Division Engineer, F. R. Mitchell, Wenonah Division Engineer, J. L. Parsons, Assistant Mine Foreman, W. L. McAlexander, Staff Photographer.

Representing Employees: Pete Dulaney, C. I. O., Arthur Praytor, A. F. of L.

Muscoda No. 6—July 11, 1941.

Representing Company: J. C. Guyton, Works Industrial Engineer, W. C. McKenzie, Muscoda Division Engineer, F. R. Mitchell, Wenonah Division Engineer, O. B. Stone, Mine Foreman, W. L. McAlexander, Staff Photographer.

Representing Employees: Robert Martin, C. I. O.

Wenonah No. 8—July 15, 1941.

Representing Company: J. C. Guyton, Works Industrial Engineer, W. C. McKenzie, Muscoda Division Engineer, F. R. Mitchell, Wenonah Division Engineer, W. L. Webb, Foreman, W. L. McAlexander, Staff Photographer.

Representing Employees: William Gamble, C. I. O.

Republic Steel Corporation—July 17, 1941.

Representing Company: B. C. Jones, Assistant Superintendent, Pelham Justice, Engineer.

Representing Employees: John Butler, C. I. O.

Representing Government: Geo. S. Wheeler, Senior Economist, J. S. Rogers, Industrial Hygienist.

It Is Further Ordered that on all or any of the aforesaid inspections or investigations, the plaintiffs or their representatives and one C. I. O. miner defendant, together with one A. F. of L. miner defendant, to be selected by each group, who are employed in the particular mine being inspected, be permitted to accompany the representatives of said Philip B. Fleming.

Dated: July 8th, 1941.

T. A. MURPHREE,
Judge.

Filed July 30, 1941.

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AMENDMENT TO PETITION AND COMPLAINT OF PETITIONER-PLAINTIFF REPUBLIC STEEL CORPORATION.

469 (Civil Action No. 5234.)

Comes Republic Steel Corporation, a corporation, petitioner and plaintiff in the above entitled cause, and, in accordance with notice heretofore given before the close of plaintiff's testimony and by permission of the Court first had and obtained, amends its petition and complaint in the following separate and several particulars:

By striking from Section II the following words where they appear therein:

"This mine is not involved in this proceeding" and by adding to said Section II at the end thereof the following averments:

"The practice of drilling, blasting and loading at the Spalding Mine is substantially the same as that at the Raimund Mine. At the Spalding Mine day shift operations begin at 7 o'clock A. M. and night shift operations at 4 o'clock P. M. for all underground work. The men are required to be at their regular places of work at the starting time. Day operations cease at 3 o'clock P. M. and night operations at 12 o'clock midnight. The underground employees deposit their checks at the tally house located at the mouth of the manway in the same way as at Raimund. However, the men are not transported in man cars at Spalding, but walk to and from their working places on their own time. Arrival at the working place at Spalding is contingent upon the length of time required for the miner to change clothes, deposit his check, obtain his battery lamp, and walk to his working place. There is no requirement as to the time the men deposit their checks, and this is only done for the purpose of knowing as to what men are in the mine and in order to supply vacancies on the crews. The only requirements as to when the men come to the bathhouse or to the entrance is that they must come at such times as to enable them to walk to their working places and be there by 7 o'clock A. M. or 4 o'clock P. M".

E. L. ALL,
BORDEN BURR,
Attorneys for Republic Steel Corporation.

Address: Birmingham, Alabama.

I hereby certify that a copy of the foregoing amendment has been duly served on Crampton Harris, J. Q. Smith, Jerome Cooper, Attorneys for the respective defendants for whom they appear as attorneys of record.

This 31 day of July, 1941.

BORDEN BURR.

Filed July 31, 1941.

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ORDER ALLOWING AMENDMENT OF PETITION AND COMPLAINT OF REPUBLIC STEEL CORPORATION.

471 (Civil Action No. 5234.)

This cause coming on to be heard on petition of the Republic Steel Corporation, a corporation, petitioner and plaintiff in the above entitled cause, to amend its petition in accordance with the amendment, a copy of which was this day served upon adverse counsel, it is

Ordered, Adjudged and Decreed by the Court that permission to file such amendment be, and the same hereby is, granted.

This the 31st day of July, 1941.

T. A. MURPHREE,
United States District Judge.

Filed Sept. 19, 1941.

472 OPINION OF THE DISTRICT COURT.

(Civil Actions Nos. 5232, 5233 and 5234.)

These cases, which were consolidated for trial, are actions for declaratory judgments. The plaintiffs are three corporation engaged, *inter alia*, in mining iron ore; they contend that the workweek of their underground ore mining employees does not include, within the meaning of Section 7 of the Fair Labor Standards Act of 1938 (Title 29, U. S. C. A., Sec. 207), that portion of the time spent by those employees in being transported and in walking to and from their usual working places. The defendants are labor union, labor union officials, and individuals, who are representatives of the general class of underground ore mining employees of the several plaintiffs. The defendants contend that the workweek of these employees includes all of the periods between the times when the miner reports for duty as required at or near the collar of the mine and when he reaches the collar at the end of the shift, except any fixed lunch period during which the miner is relieved of all duties, and also includes the aggregate of time spent on the surface in obtaining and returning lamps, carbide and tools, and in checking in and out. Because many persons in the class of the defendants are making claims upon the several plaintiffs for overtime compensation, based on the contention made by defendants in these actions, a justiciable controversy is presented.

The Administrator of the Wage and Hour Division of the United States Department of Labor has been permitted to intervene in each action, and he has made herein substantially the same contentions as have the several defendants.

The question presented is one of construction and application of the Fair Labor Standards Act of 1938 (herein-

after referred to as the Act). The important portion of Section 7 of the Act is:

"(a) No employer shall, except as otherwise provided in this section, employ any of his employees who is engaged in commerce or in the production of goods for commerce—

(1) for a workweek longer than forty-four hours during the first year from the effective date of this section,

(2) for a workweek longer than forty-two hours during the second year from such date, or

(3) for a workweek longer than forty hours after the expiration of the second year from such date, unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed."

By the provisions of Section 3 (g) of the Act [Title 29, U. S. C. A. S 203 (g)], "employ" is defined to include "to suffer or permit to work".

The plaintiffs, in order to prove their contended construction and application, adduced evidence of two kinds: (1) evidence of an alleged custom or usage, with respect to the issues here presented, of a kind that the plaintiffs contend Congress must have adopted in Section 7; and (2) evidence of the activities of typical underground miners in the plaintiffs' ore mines, in order to prove that their traveling and walking time is not within the purview of the language of the Act.

The defendants' evidence has been to prove: (1) that no such custom as contended by the plaintiffs existed, and that if it did it may not be given the effect contended

for by the plaintiffs, and (2) that the activities of the underground ore mine employees here in issue have in fact constituted part of their employment and workweek.

1. Custom or Usage.

The plaintiffs' evidence as to custom or usage consists chiefly of the terms and agreements under which the defendants and their class of employees have worked and been paid, both by plaintiffs and other employers in the same industry. The plaintiffs contend that the custom has always and universally been such as to exclude any payment for the time spent by underground iron ore mine employees in walking and being transported to and from their usual working places, and to include only payment for time actually spent by such employees at their regular stations underground. The plaintiffs contend that this custom was so well established and understood that Congress must have adopted it in its use of the terms "employ" and "workweek" in Section 7 of the Act.

The evidence has disclosed no such custom. During the great part of iron ore mining history in this district payment of the producing crews has been on a tonnage basis, the time spent by them at any place or places having no bearing whatsoever on their wages. At other times and places, payment was on a task basis, without regard to hours worked at any point. But plaintiffs place their greatest reliance of proof of custom upon the arrangements and contracts with the defendant labor unions under which the underground ore miners have worked for plaintiffs during the past several years. A typical provision of these contracts is: "Eight hours work per day shall constitute a day's work and forty hours shall constitute a week's work. The eight hours per day means eight hours of work at the usual working

place, exclusive of the lunch period." This provision carries little weight in establishment of a custom not to pay for travel time, since in practice no record of the time spent "at the usual working place" has been kept and it was the exception rather than the rule that a man worked precisely eight hours at such a place. The actual practice under those contracts was for the company to arrange a shift which was supposed to run, by way of example, from 6:45 A. M. to 3:15 P. M. at the usual stations of duty underground, with thirty minutes off for lunch. The men in the working stations closer to the underground man unloading stations would usually actually arrive at their working stations before 6:45 A. M. and start working earlier than 6:45 A. M., the men in the furtherest working stations would frequently actually arrive later than 6:45 A. M. Quite generally most of the producing crews left their particular stations before 3:15 P. M. In all cases the men were credited with exactly eight hours work, except in very unusual cases, although the time spent "at the usual working place" fluctuated thirty to forty-five minutes per shift as between men. Under those circumstances, regardless of the phraseology of the contracts, the pay was on a shift basis, rather than an hourly basis, and since some of the men did not spend a full eight hours at their particular stations, it cannot be categorically stated that they received no compensation for at least part of the time spent by them in travelling to and from their usual stations.

It cannot be said that any established usage existed in the method of pay that made it clearly understood, by those concerned with iron ore mining, that the time spent in being transported and walking to and from the usual working places was not work or time spent in the employ of the employer. No custom existed that would indicate that the phrases "employ" and "work-

week", used in Section 7 of the Act, would be understood, in their application to underground iron ore mining, to exclude such time from their purport.

Even if the mode of payment of these men did clearly exclude such time as employment and workweek time, it could not provide a controlling construction of Section 7 of the Act. The evidence clearly establishes that the methods of payment of wages were dictated almost entirely by the employers. The employees worked on the best terms they could obtain and the fact that they could not obtain terms that would compensate them for time spent in travelling underground to and from their working stations does not indicate that they did not consider that time as working time. It cannot be said that the way in which the iron ore miners have received their pay establishes, with their free and uncoerced agreement, the proposition that the time in question is not work time. Prior to the enactment of the Fair Labor Standards Act of 1938, iron ore miners repeatedly made efforts to obtain full, or at least a larger partial, compensation for so-called travel time. The fact that they were unsuccessful does not determine that they were erroneous in their contention that such time was work time, nor does it determine that Congress, in using the phraseology of Section 7 of the Act, adopted the prevailing method of payment. Since the usual methods of payment were not arrived at by unhampered consent of the workers, it would be no more reasonable to assume that Congress, in the Fair Labor Standards Act, adopted the employers' formula than to assume that Congress intended to remedy the practice so far as it may have denied compensation for actual work. That Congress has the authority to abrogate such a practice was made clear in *Holden v. Hardy*, 169 U. S. 366, 397, where the Court said:

"The legislature has also recognized the fact, which the experience of legislators in many States has corroborated, that the proprietors of these establishments and their operatives do not stand upon an equality, and that their interests are, to a certain extent, conflicting. The former naturally desire to obtain as much labor as possible from their employes, while the latter are often induced by the fear of discharge to conform to regulations which their judgment, fairly exercised, would pronounce to be detrimental to their health or strength. In other words, the proprietors lay down the rules and the laborers are practically constrained to obey them. In such cases self-interest is often an unsafe guide, and the legislature may properly interpose its authority."

No matter how strong a custom existed as to payment of ore miners, if the activities here in issue actually constituted employment and work, it could not be contended that the custom prevailed to deny the defendants compensation for the time consumed thereby. An occupational custom or usage cannot operate to avoid the mandate of an Act of Congress. *United States v. Houston Belt and Terminal Ry. Co.*, 205 Fed. 344 (C. C. A. 5, 1913). *Ramsauer v. United States*, 21 F. (2d) 907, (C. C. A. 9, 1927). See: *Holden v. Hardy, supra.* Especially is this true in the case of the Fair Labor Standards Act, which is clearly remedial in character. *(Fleming v. Carleton Screw Products Co.*, 37 F. Supp. 754 (D. C. Minn., 1941). The Act was established for the avowed purpose of eliminating detrimental labor conditions (Section 2 of the Act, Title 29, U. S. C. R. § 202) and it would be a mockery of the beneficient purposes of the Act if the provisions prohibiting employment for over a specified number of hours for each workweek, except at an increased rate of compensation, were held to incorporate a custom to pay employees only for a part of the time worked by them. Assuming the time in question is actually working time,

there can be no doubt that it must be considered as a part of the workweek within the terms of the Act, and the alleged custom could not avoid the remedial effects of the Act.

Evidence has been introduced of administrative applications of other and similar laws, limiting or specifying hours of labor, to other situations. Because the facts in those cases to which those administrative applications were made, were quite different from the facts of the present case, little light on the proper construction and application of the Fair Labor Standards Act to these cases has been shed by this evidence.

In the last analysis, therefore, plaintiffs must stand or fall on the question whether the time in issue was employment and work, as a matter of simple fact.

2. Activities Constituting Work.

No serious conflict of evidence is apparent as to the liability of the plaintiffs for payment to their underground ore mining employees for the aggregate of time spent on the surface in obtaining and returning lamps, carbide and tools and in checking in and out. The plaintiffs' evidence with respect to this time has been that the employees in question only occasionally obtained and returned tools on the surface, and that obtaining and returning carbide and lamps and checking in and out only consumed short periods of time. Certainly the infrequency of activities or the speed with which they can be performed will not change their essential nature as work, and it seems an inescapable conclusion that the activities mentioned are obviously work. They are performed on the premises of the employer, in the furtherance of the employer's business, with no benefit to the employee (except to aid him in the performance of work for the employer), under conditions created and con-

trolled by the employer, and they involve responsibility to the employer and physical exertion, even though not burdensome, on the part of the employee. No characteristic of work is lacking. This time must be included in the workweek of the employees represented by the defendants.

The second element of time which plaintiffs seek to have adjudicated as not within the workweek is the time spent by the underground ore mining employees in being transported from the surface to points at varying distances below the surface and back again at the end of the shift. In the same category must be considered supplemental rides given the men on the way to and from their underground stations between underground points. The plaintiffs ask for a declaration from this Court determining whether this transportation is within the workweek, without consideration of the actual conditions and manner in which the transportation has occurred. This Court is not empowered to make such a declaration. Jurisdiction is delimited by the bounds of the actual controversy presented, and to attempt adjudications beyond those bounds could not be a proper judicial function. See: *Aetna Life Ins. Co. v. Haworth*, 300 U. S. 227, 240 et seq. (1937). The actual controversy concerns only the working time of the underground iron ore mining employees in the plaintiffs' iron ore mines, during the time between the effective date of the Act and the commencement of these actions, where and when certain conditions and activities existed and occurred. It is with reference to these conditions and activities, and not with reference to some hypothetical future circumstances, that we must deal with the questions here presented.

It is particularly important in these cases that the problem be approached in this factual manner, because transportation in the abstract might be construed to be a restful and pleasurable activity for the passengers. In

the underground ore mines of the plaintiffs and in the manner in which the underground ore mining employees have been transported, the reverse has been true. The cars in which the employees have been transported have not been designed for comfort, have frequently been merely ore cars bearing remnants of iron ore muck. The cars have been nearly always crowded to the extreme. The positions which the men have been required to assume during the transportation varies from a crouch with their bodies overlying one another to a rigid propping of legs and arms against the sides of the car and the fellow passengers. These positions were assumed partially because of the press of human bodies in the cars and partially because of the necessity of keeping head and body in a deflected position in order to avoid injury from collision with low points in the roofs of the mine slopes or with projections from the roofs. These conditions have occasionally resulted in injuries of various kinds to the employees when the required degree of restraint and alertness has been relaxed. The trips were, of course, in the comparative darkness and enclosure of an artifically lighted mine. The air was humid and malodorous, the ventilation relatively poor and the heat increasing with the descent into the mine. These conditions are recited not for the purpose of censure of the plaintiffs' manner of maintenance of their mines, for these conditions may well be normal conditions in iron ore mines and practically inevitable. Nevertheless, the conditions are clearly conditions peculiar to the occupation of the men in the class represented by the defendants, conditions replete with hazards, conditions requiring physical exertion and mental alertness, and conditions unpleasant and burdensome to those encountering them.

The evidence has made clear that the transportation was had under the strict control and supervision of the plaintiffs. The plaintiffs prescribed the schedule of the

trips; the speed of the trips, the loading of the men into the trips, the rules of conduct during the trips, and in most cases required the men to ride the trip rather than walk. The plaintiffs contend that these were safety measures that would be applicable to any outsider coming into the mines. But the controls of the plaintiffs over the trips were clearly exercised in the interest of efficient operation of their mining business. Too, it is significant to note that infractions by employees of plaintiffs' controls over these trips caused such employees to be subjected to the discipline of the plaintiffs. Clearly, during the trips, up and down, the men were under the complete supervision of the plaintiffs. This conclusion is emphasized by the fact that frequently men were given their first instructions of the day prior to commencement of their trip down the slope, and it appears that they were always subject to such instructions on the surface regardless of the frequency with which explicit instructions were actually given. This fact further indicates that the employees on the trips down into the mines were engaged in and about the business of the plaintiffs.

We must conclude that the time spent in this type of transportation is worktime. It bears in a substantial degree every indicia of worktime: supervision by the employer, physical and mental exertion, activity necessary to be performed for the employers' benefit, and conditions peculiar to the occupation of mining. While time consumed in such transportation is not itself part of the time consumed in the actual production of ore, yet such time is a necessary and incidental part of the actual production of ore.

We do not mean to indicate that every detail of the conditions and activities referred to are requisite to constitute this travel time worktime, because these conditions have varied slightly from mine to mine and from time to time. But these details have generally prevailed,

and even the minimization of the essential elements of work, which have here usually been present in some degree, does not change the conclusion that work has in fact been performed. See: *Missouri, K. & T. Ry. Co. v. United States*, 231 U. S. 112 (1913).

The final element of time in issue is the time spent in walking between the points underground at which the men were unloaded on the way in and loaded on the way out and the points at which the men were stationed, i. e. between the underground manloading station and the particular working places.

During these walks, the physical conditions encountered by the men were even more difficult than during the part of the descent spent in riding. The atmosphere becomes warmer and more humid, the ventilation even less effective and the air fetid. The roof is low in places, requiring the walkers to stoop. The footing is irregular, sometimes rough, sometimes wet and slippery, overhead wires (often not insulated or guarded) and pipes must be carefully avoided. The passageways are up and down grades of varying steepness. In short, a very substantial amount of physical and mental energy is required during this walking.

What has been said of the supervision by the employer of the time during which the men are transported up and down the main slope applies equally to the walking time of the men away from and back to the slope.

We find that the time consumed by the men in walking from the underground manloading station to their usual working places and back again at the end of the shifts, was part of their employment and was worktime.

We conclude that the fixed lunch periods of one-half hour during which the employees have been relieved of all duties are not part of their employment or of their workweek.

The conclusions here stated have been reached by examination of the facts existent in the plaintiffs' mines during the period in which the underground ore miners are claiming that they earned unpaid compensation for overtime work under the provisions of the Fair Labor Standards Act. It may be helpful, however, to observe that these conclusions are the same as those announced in the summary of the so-called "modified portal to portal" opinion of the Administrator of the Wage and Hour Division of the United States Department of Labor on March 15, 1941, which summary is as follows:

"The workday in underground metal mining starts when the miner reports for duty as required at or near the collar of the mine, and ends when he reaches the collar at the end of the shift.

"The workday also includes the aggregate of the time spent on the surface in obtaining and returning lamps, carbide and tools, and in checking in and out.

"The workday does not include any fixed lunch period of one-half hour or more during which the miner is relieved of all duties, even though the lunch period is spent underground."

The defendants have filed counterclaims against the plaintiffs for themselves and others entitled to compensation for overtime worked, by virtue of the fact that the time and activity put in issue by plaintiffs' complaints constitutes employment work. Since we have concluded that the defendants are correct in their general position, these counterclaims will be set down for separate trial and judgment at a convenient date [See Rule 42(b), Federal Rules of Civil Procedure].

Findings of fact, conclusions of law and declaratory judgment, in conformity with this opinion, will be entered in each of these actions.

T. A. MURPHREE,
United States District Judge.

Filed in Clerk's office August 13, 1941.

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## MOTION OF PETITIONER-PLAINTIFF, TENNESSEE COAL, IRON & RAILROAD COMPANY, FOR JUDGMENT OR DECREE IN ITS FAVOR.

485 (Civil Action No. 5232.)

Comes plaintiff in the above entitled cause, and moves the Court, separately and severally, as follows:

1. For a judgment or decree in its favor and against the defendants, separately and severally.

2. For a judgment or decree in its favor and against the defendants, separately and severally, in accordance with its petition and prayer as set forth in Section XI of its complaint as last amended.

3. For a judgment or decree in its favor and against the defendants, separately and severally, in accordance with its petition and prayer as set forth in subsection (a) of Section XI of its complaint as last amended.

4. For a judgment or decree in its favor and against the defendants, separately and severally, in accordance with its petition and prayer as set forth in subsection (b) of Section XI of its complaint as last amended.

5. For a judgment or decree in its favor and against the defendants, separately and severally, in accordance with its petition and prayer as set forth in subsection (c) of Section XI of its complaint as last amended.

7. For a judgment or decree in its favor and against the defendants, separately and severally, in accordance with its petition and prayer as set forth in subsection (e) of Section XI of its complaint as last amended.

6. For a judgment or decree in its favor and against the defendants, separately and severally, in accordance with its petition and prayer as set forth in subsection (d) of Section XI of its complaint as last amended.

8. For a judgment or decree in its favor and against the defendants, separately and severally, in accordance with its petition and prayer as set forth in subsection (f) of Section XI of its complaint as last amended.

9. For a declaratory judgment judicially construing the Fair Labor Standards Act of 1938 and Section 7 thereof, in so far as it relates to the underground employees of the plaintiff, so as to find and declare that it was the intention of the Congress in the enactment of Section 7 of the Fair Labor Standards Act of 1938 (considered in its application to plaintiff's underground employees, and under the pleadings and proof herein) that the "work-week" of plaintiff's underground employees should not include any portion of their time spent in being transported or walking to and from their usual working places and while not engaged in any physical work or service for the plaintiff.

10. For a declaratory judgment judicially construing the Fair Labor Standards Act of 1938 and Section 7

thereof, in so far as it relates to the underground employees of the plaintiff, so as to find and declare that it was the intention of the Congress in the enactment of Section 7 of the Fair Labor Standards Act of 1938 (considered in its application to plaintiff's underground employees, and under the pleadings and proof herein) that the "workweek" of plaintiff's underground employees consists only of the time actually spent by such underground employees in working at and around their usual working places.

11. For a declaratory judgment judicially construing the Fair Labor Standards Act of 1938 and Section 7 thereof, in so far as it relates to the underground employees of the plaintiff, so as to find and declare that it was the intention of the Congress in the enactment of Section 7 of the Fair Labor Standards Act of 1938 (considered in its application to plaintiff's underground employees, and under the pleadings and proof herein) that the "workweek" of plaintiff's underground employees should not include any time of its underground employees embracing (without any physical work or service for the plaintiff being done by such employees during such times):

(a) Any time spent in the bath house;

(b) Any time spent in going from and to the bath house to and from the portal;

(c) Any time spent in being transported from and to the portal to and from the underground manloading station;

(d) Any time spent in walking to and from their usual working places from and to the underground manloading station;

(e) Any time during the thirty-minute lunch period.

12. For a declaratory judgment judicially construing the Fair Labor Standards Act of 1938 and Section 7 thereof, in so far as it relates to the underground employees of the plaintiff, so as to find and declare that it was the intention of the Congress in the enactment of Section 7 of the Fair Labor Standards Act of 1938 (considered in its application to plaintiff's underground employees, and under the pleadings and proof herein) that, in computing the "workweek" of the underground employees of the plaintiff, the "workweek" of such underground employees should not include all of the time of such underground employees spent underground.

13. For a declaratory judgment judicially construing the Fair Labor Standards Act of 1938 and Section 7 thereof, in so far as it relates to the underground employees of the plaintiff, so as to find and declare that it was the intention of the Congress in the enactment of Section 7 of the Fair Labor Standards Act of 1938 (considered in its application to plaintiff's underground employees, and under the pleadings and proof herein) that the "workweek" of the underground employees of the plaintiff should not be computed so as to include as time worked all of the time spent by such underground employees in traveling from and to the portal of the mine.

14. For a declaratory judgment judicially construing the Fair Labor Standards Act of 1938 and Section 7 thereof, in so far as it relates to the underground employees of the plaintiff, so as to find and declare that it was not the intention of the Congress in the enactment of Section 7 of the Fair Labor Standards Act of 1938 (considered in its application to plaintiff's underground employees, and under the pleadings and proof herein) that in computing the "workweek" the work day of plaintiff's

underground employees should start when the employees reported at or near the portal of the mine and end when they reached the portal at the end of the shift.

15. For a declaratory judgment judicially construing the Fair Labor Standards Act of 1938 and Section 7 thereof, in so far as it relates to the underground employees of the plaintiff, so as to find and declare that it was not the intention of the Congress in the enactment of Section 7 of the Fair Labor Standards Act of 1938 (considered in its application to plaintiff's underground employees, and under the pleadings and proof herein) that in computing the "workweek" the work day of plaintiff's underground employees should start when the employees reported at or near the portal of the mine and end when they reached the portal at the end of the shift, unless such employees during the time of being transported or walking to and from their working place were required or suffered or permitted by the plaintiff to carry tools or supplies, receive instructions in reference to their work or perform some work or service for the plaintiff aside from their transportation or walking to and from their usual working places.

16. For a declaratory judgment judicially construing the Fair Labor Standards Act of 1938 and Section 7 thereof, in so far as it relates to the underground employees of the plaintiff, so as to find and declare that it was not the intention of the Congress in the enactment of Section 7 of the Fair Labor Standards Act of 1938 (considered in its application to plaintiff's underground employees, and under the pleadings and proof herein) that, in computing the "workweek" of the underground employees of the plaintiff, the "workweek" of such underground employees should include all of the time of such underground employees spent underground.

17. For a declaratory judgment judicially construing the Fair Labor Standards Act of 1938 and Section 7 thereof, in so far as it relates to the underground employees of the plaintiff, so as to find and declare that it was not the intention of the Congress in the enactment of Section 7 of the Fair Labor Standards Act of 1938 (considered in its application to plaintiff's underground employees, and under the pleadings and proof herein) that the "workweek" of the underground employees of the plaintiff should be computed so as to include as time worked all of the time spent by such underground employees in traveling from and to the portal of the mine.

18. For a declaratory judgment judicially construing the Fair Labor Standards Act of 1938 and Section 7 thereof, in so far as it relates to the underground employees of the plaintiff, so as to find and declare that it was the intention of the Congress in the enactment of Section 7 of the Fair Labor Standards Act of 1938 (considered in its application to plaintiff's underground employees, and under the pleadings and proof herein) that the time consumed by the underground employees of the plaintiff in walking from the underground manloading station to their usual working places and back again at the end of the shift should not be computed as a part of the "workweek" of such employees.

19. For a declaratory judgment judicially construing the Fair Labor Standards Act of 1938 and Section 7 thereof, in so far as it relates to the underground employees of the plaintiff, so as to find and declare that it was the intention of the Congress in the enactment of Section 7 of the Fair Labor Standards Act of 1938 (considered in its application to plaintiff's underground employees, and under the pleadings and proof herein) that

the time consumed by the underground employees of the plaintiff in walking from the underground manloading station to their usual working places and back again at the end of the shift should not be computed as a part of the "workweek" of such employees, unless such employees during such time were required or suffered or permitted by the plaintiff to carry tools or supplies, receive instructions in reference to their work, or perform some work or service for the plaintiff aside from their walking to and from their usual working places from and to the underground manloading station.

20. For a declaratory judgment judicially construing the Fair Labor Standards Act of 1938 and Section 7 thereof, in so far as it relates to the underground employees of the plaintiff, so as to find and declare that it was the intention of the Congress in the enactment of Section 7 of the Fair Labor Standards Act of 1938 (considered in its application to plaintiff's underground employees, and under the pleadings and proof herein) that the time spent by the underground employees of the plaintiff in being transported from the portal of the mine to the underground manloading station should not be computed as a part of the "workweek" of such employees.

21. For a declaratory judgment judicially construing the Fair Labor Standards Act of 1938 and Section 7 thereof, in so far as it relates to the underground employees of the plaintiff, so as to find and declare that it was the intention of the Congress in the enactment of Section 7 of the Fair Labor Standards Act of 1938 (considered in its application to plaintiff's underground employees, and under the pleadings and proof herein) that the time spent by the underground employees of the plaintiff in being transported from the portal of the mine to the

underground manloading station should not be computed as a part of the workweek, unless such employees during the time of being transported from the portal of the mine to the underground manloading station were required or suffered or permitted by the plaintiff to carry tools or supplies, receive instructions in reference to their work, or perform some work or service for the plaintiff aside and apart from their being transported from the portal of the mine to the underground manloading station.

22. For a declaratory judgment judicially construing the Fair Labor Standards Act of 1938 and Section 7 thereof, in so far as it relates to the underground employees of the plaintiff, so as to find and declare that it was the intention of the Congress in the enactment of Section 7 of the Fair Labor Standards Act of 1938 (considered in its application to plaintiff's underground employees, and under the pleadings and proof herein) that the time spent by the underground employees of the plaintiff in being transported from the underground manloading station to the portal of the mine should not be computed as a part of the workweek."

23. For a declaratory judgment judicially construing the Fair Labor Standards Act of 1938 and Section 7 thereof, in so far as it relates to the underground employees of the plaintiff, so as to find and declare that it was the intention of the Congress in the enactment of Section 7 of the Fair Labor Standards Act of 1938 (considered in its application to plaintiff's underground employees, and under the pleadings and proof herein) that the time spent by the underground employees of the plaintiff in being transported from the underground manleading station to the portal of the mine should not be computed as a part of the "workweek", unless such employees during the time of being transported from the

underground manloading station to the portal of the mine were required or suffered or permitted by the plaintiff to carry tools of supplies, receive instructions in reference to their work or perform some work or service for the plaintiff aside and apart from their being transported from the underground manloading station to the portal.

'24. For a declaratory judgment judicially construing the Fair Labor Standards Act of 1938 and Section 7 thereof, in so far as it relates to the underground employees of the plaintiff, so as to find and declare that it was the intention of the Congress in the enactment of Section 7 of the Fair Labor Standards Act of 1938 (considered in its application to plaintiff's underground employees, and under the pleadings and proof herein) that the "workweek" of the underground employees of the plaintiff should not be computed so as to include the aggregate of the time spent by plaintiff's underground mining employees on the surface in obtaining and returning lamps, carbide, and tools and in checking in and out.

25. For a declaratory judgment judicially construing the Fair Labor Standards Act of 1938 and Section 7 thereof, in so far as it relates to the underground employees of the plaintiff, so as to find and declare that it was the intention of the Congress in the enactment of Section 7 of the Fair Labor Standards Act of 1938 (considered in its application to plaintiff's underground employees, and under the pleadings and proof herein) that the "workweek" of the underground employees of the plaintiff during the period of time from October 24, 1938 to October 24, 1939, should not be computed so as to include the aggregate of the time spent by plaintiff's underground mining employees on the surface in obtaining and returning lamps, carbide, and tools and in check-

ing in and out, unless the aggregate of such time and the underground working time of such employees exceeded the aggregate of forty-four hours spent by such employees during such workweek.

26. For a declaratory judgment judicially construing the Fair Labor Standards Act of 1938 and Section 7 thereof, in so far as it relates to the underground employees of the plaintiff, so as to find and declare that it was the intention of the Congress in the enactment of Section 7 of the Fair Labor Standards Act of 1938 (considered in its application to plaintiff's underground employees, and under the pleadings and proof herein) that the "workweek" of the underground employees of plaintiff during the period of time from October 24, 1939, to October 24, 1940, should not be computed so as to include the aggregate of the time spent by plaintiff's underground mining employees on the surface in obtaining and returning lamps, carbide, and tools and in checking in and out, unless the aggregate of such time and the underground working time of such employees exceeded the aggregate of forty-two hours spent by such employees during such workweek.

27. For a declaratory judgment judicially construing the Fair Labor Standards Act of 1938 and Section 7 thereof, in so far as it relates to the underground employees of the plaintiff, so as to find and declare that it was the intention of the Congress in the enactment of Section 7 of the Fair Labor Standards Act of 1938 (considered in its application to plaintiff's underground employees, and under the pleadings and proof herein) that the "workweek" of the underground employees of plaintiff during the period of time from October 24, 1940, to May 1, 1941 should not be computed so as to include the aggregate of the time spent by plaintiff's underground

mining employees on the surface in obtaining and returning lamps, carbide, and tools and in checking in and out, unless the aggregate of such time and the underground working time of such employees exceeded the aggregate of forty hours spent by such employees during such "workweek."

28. For a declaratory judgment judicially construing the Fair Labor Standards Act of 1938 and Section 7 thereof, in so far as it relates to the underground employees of the plaintiff, so as to find and declare that it was the intention of the Congress in the enactment of Section 7 of the Fair Labor Standards Act of 1938 (considered in its application to plaintiff's underground employees, and under the pleadings and proof herein) that in computing the "workweek" of plaintiff's underground service employees, their work days should be computed as beginning when they report for work in that place in plaintiff's mine where their work under their immediate supervisor actually begins, and should not be computed as including any portion of the time which they spend in being transported or in walking to such place.

29. For a declaratory judgment judicially construing the Fair Labor Standards Act of 1938 and Section 7 thereof, in so far as it relates to the underground employees of the plaintiff, so as to find and declare that it was the intention of the Congress in the enactment of Section 7 of the Fair Labor Standards Act of 1938 (considered in its application to plaintiff's underground employees, and under the pleadings and proof herein) that in computing the "workweek" of plaintiff's underground service employees, their work days should be computed as beginning when they report for work in that place in plaintiff's mine where their work under their

immediate supervisor actually begins, and should not be computed as including any portion of the time which they spend in being transported or in walking to such place, unless such employees during the time of being transported or walking to and from such place was required or suffered or permitted by the plaintiff to carry tools or supplies, receive instructions in reference to his work, or perform some work or service for the plaintiff aside from his transportation or walking to and from such place.

30. For a declaratory judgment judicially construing the Fair Labor Standards Act of 1938 and Section 7 thereof, in so far as it relates to the underground employees of the plaintiff, so as to find and declare that it was the intention of the Congress in the enactment of Section 7 of the Fair Labor Standards Act of 1938 (considered in its application to plaintiff's underground employees, and under the pleadings and proof herein) that in computing the "workweek" of plaintiff's underground service employees, the work day of such employees should be computed as beginning when they reported for work in that place in plaintiff's mine where their work under their immediate supervisor actually began, and should not be computed as including any portion of the time which they spent in being transported or in walking to and from such place, unless they were required or suffered or permitted by the plaintiff during such time to carry tools or supplies, receive instructions, or engage in some work or service for the plaintiff apart from or in addition to being transported or walking to and from such working place.

31. For a declaratory judgment judicially construing the Fair Labor Standards Act of 1938 and Section 7 thereof, in so far as it relates to the underground em-

ployees of the plaintiff, so as to find and declare that it was the intention of the Congress in the enactment of Section 7 of the Fair Labor Standards Act of 1938 (considered in its application to plaintiff's underground employees, and under the pleadings and proof herein) that, in computing the "workweek" of plaintiff's underground productive employees, the work day of such employees should be computed as beginning when they reported for work at their usual working place in plaintiff's mine and where their work under their immediate supervisor actually began, and should not be computed as including any portion of the time spent in being transported or in walking to and from such place, unless they are required during such time or suffered or permitted by the plaintiff to carry tools or supplies, receive instructions, or perform some work or service for the plaintiff.

32. For a declaratory judgment judicially construing the Fair Labor Standards Act of 1938 and Section 7 thereof, in so far as it relates to the underground employees of the plaintiff, so as to find and declare that it was the intention of the Congress in the enactment of Section 7 of the Fair Labor Standards Act of 1938 (considered in its application to plaintiff's underground employees, and under the pleadings and proof herein) that, in computing the "workweek" of plaintiff's underground productive employees, the work day of such employees should be computed as ending when they left their usual working place in plaintiff's mine, and should not be computed as including any portion of the time spent in being transported or in walking from such usual working place, unless they are required during such time or suffered or permitted by the plaintiff to carry tools or supplies, receive instructions, or perform some work or service for the plaintiff.

33. For a declaratory judgment judicially construing the Fair Labor Standards Act of 1938 and Section 7 thereof, in so far as it relates to the underground employees of the plaintiff, so as to find and declare that it was the intention of the Congress in the enactment of Section 7 of the Fair Labor Standards Act of 1938 (considered in its application to plaintiff's underground employees, and under the pleadings and proof herein) that, in computing the "workweek" of the underground employees of the plaintiff the time spent by them in depositing their checks on or before entering the mine and in taking them up upon their exit from the mine should not be included as a part of the "workweek."

34. For a declaratory judgment judicially construing the Fair Labor Standards Act of 1938 and Section 7 thereof, in so far as it relates to the underground employees of the plaintiff, so as to find and declare that it was the intention of the Congress in the enactment of Section 7 of the Fair Labor Standards Act of 1938 (considered in its application to plaintiff's underground employees, and under the pleadings and proof herein) that, in computing the "workweek" of plaintiff's underground employees, the mere fact that plaintiff's underground employees in being required or suffered or permitted by the plaintiff to be transported from and to the portal of the mine to and from the underground manloading station, were thereby made subject to the hazards of being injured as a proximate result of the character or condition of the vehicle furnished by plaintiff for such transportation, or subject to other hazards usually incident to underground employees, did not in and of itself require the time spent in such transportation to be computed as a part of the "workweek" of such employees.

35. For a declaratory judgment judicially construing the Fair Labor Standards Act of 1938 and Section 7

thereof; in so far as it relates to the underground employees of the plaintiff, so as to find and declare that it was the intention of the Congress in the enactment of Section 7 of the Fair Labor Standards Act of 1938 (considered in its application to plaintiff's undergound employees, and under the pleadings and proof herein) that, in computing the "workweek" of plaintiff's underground employees, the mere fact that plaintiff's underground employees in being required or suffered or permitted by the plaintiff to walk from the underground manloading station to their usual place of work and from their usual place of work to the underground man-loading station were thereby made subject to the hazard of being injured as a proximate result of falling rock, or other hazards incident to underground mining did not in and of itself require the time spent in walking to and from such places to be computed as a part of the "workweek" of such employees.

36: For a declaratory judgment judicially construing the Fair Labor Standards Act of 1938 and Section 7 thereof, in so far as it relates to the underground employees of the plaintiff, so as to find and declare that it was the intention of the Congress in the enactment of Section 7 of the Fair Labor Standards Act of 1938 (considered in its application to plaintiff's underground employees, and under the pleadings and proof herein) that the time spent by the underground employees of the plaintiff in traveling from the portal or entrance of its mines to their usual working places, and in returning from such working places to the entrance or portal of the mines, should not be computed as work time within the meaning of the Fair Labor Standards Act, and that in determining the number of hours worked in any "workweek" such time should not be included.

37. For a declaratory judgment judicially construing the Fair Labor Standards Act of 1938 and Section 7 thereof, in so far as it relates to the underground employees of the plaintiff, so as to find and declare that it was the intention of the Congress in the enactment of Section 7 of the Fair Labor Standards Act of 1938 (considered in its application to plaintiff's underground employees, and under the pleadings and proof herein) that the "workweek", within meaning of the Fair Labor Standards Act of 1938, Section 7, should not include travel time, as such, consumed by plaintiff's underground employees in going from the portal or entrance of the mine to their usual working place, and in returning therefrom to such portal or entrance.

38. For a declaratory judgment judicially construing the Fair Labor Standards Act of 1938 and Section 7 thereof, in so far as it relates to the unlerground employees of the plaintiff, so as to find and declare that it was the intention of the Congress in the enactment of Section 7 of the Fair Labor Standards Act of 1938 (considered in its application to plaintiff's underground employees, and under the pleadings and proof herein) that the "workweek," within the meaning of the Fair Labor Standards Act of 1938, Section 7, should not include travel time, per se, consumed by plaintiff's underground employees in going from the portal or entrance of the mine to their usual working places, and in returning therefrom to such portal or entrance.

39. For a declaratory judgment judicially construing the Fair Labor Standards Act of 1938 and Section 7 thereof, in so far as it relates to the underground employees of the plaintiff, so as to find and declare that it was the intention of the Congress in the enactment of Section 7 of the Fair Labor Standards Act of 1938 (considered in its application to plaintiff's underground employees, and un-

der the pleadings and proof herein) that the time spent by any underground employee of the plaintiff in going from the portal or entrance of the mine to his usual working place, and in returning from such usual place to the portal or entrance, should not constitute work time within the meaning of Section 7 of the Fair Labor Standards Act of 1938, unless such employee during the time in which he is traveling from the portal to the working place and returning does some work for the plaintiff other than taking with him his lights and carbide.

40. For a judgment or decree in its favor and against the defendants, separately and severally, determining and declaring that the plaintiff is not indebted to the defendants and its underground mining employees as compensation for any time spent by them since the enactment of the Act in the bath house, or in going from and to the bath house to and from the portal, or to and from the underground man loading station from or to the portal, or to and from the actual working places of the underground employees from or to the underground manloading station (during which time said employees perform no physical labor or service in connection with their actual work).

The above motion, and each separate and several portion thereof, is made separately and severally as to:

(a) each of plaintiff's ore mines, and all of the underground employees working in each of said ore mines, and

(b) plaintiff's underground limestone mine and all of the underground employees working in such mine.

E. L. ALL,
BORDEN BURR,
Attorneys for Plaintiff, Tennessee Coal, Iron and Railroad Company.

Address: Birmingham, Alabama.

I hereby certify that a copy of the foregoing has been served upon Crampton Harris, J. Q. Smith, and Jerome A. Cooper, attorneys for the respective defendants, on this the 5 day of September, 1941.

E. L. ALL,
BORDEN BURR,
Attorneys for Plaintiff, Tennessee Coal, Iron and Railroad Company.

Address: Birmingham, Alabama.

Filed Sept. 6, 1941.

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MOTION OF PETITIONER-PLAINTIFF, SLOSS-SHEFFIELD STEEL & IRON COMPANY, FOR JUDGMENT OF DECREE IN ITS FAVOR.

500 (Civil Action No. 5233.)

Comes the plaintiff in the above entitled cause, and moves the Court, separately and severally as follows:

1. For a judgment or decree in its favor and against the defendants and each of the defendants separately and severally.

2. For a judgment or decree in its favor and against the defendants and each of the defendants separately and severally, in accordance with its petition and prayer as set forth in Section XI of its complaint as last amended and the subsections of said Section XI.

3. For a judgment or decree declaring and adjudging that the plaintiff has fully complied with the provisions of Section 7 of the Fair Labor Standards Act of 1938.

4. For a judgment or decree declaring and adjudging that the Congress, in the enactment of Section 7 of the Fair Labor Standards Act intended that the "workweek" should consist of the time actually spent by the underground employees of the plaintiff working at and around their usual working places.

5. For a judgment or decree declaring and adjuding that the Congress, in the enactment of Section 7 of the Fair Labor Standards Act, intended that the "workweek" of plaintiff's underground employees should not include any portion of their time spent in being transported or in walking to and from their working places.

6. For a judgment or decree declaring and adjudging that the Congress, in the enactment of Section 7 of the Fair Labor Standards Act, intended that the "workweek" of plaintiff's underground employees should not include any portion of their time spent in being transported or in walking to and from their working places unless the time spent in being transported or in walking to and from their usual working places is attended by some work or service on behalf of the company in addition to traveling.

7. For a judgment or decree declaring and adjuding that the Congress, by the language employed in the Fair Labor Standards Act, and particularly Section 7 thereof, intended that the "Workday" of plaintiff's underground employees should not include any time other than the time agreed upon between them and plaintiff, as shown by the long existing custom and usage and the history of the contracts between plaintiff and the unions representing the employees of plaintiff in the negotiation and execution of contracts, including the present contract under which such employees are working.

8. For a judgment or decree declaring and adjudging that the "workday" of plaintiff's underground employees begins and ends when the employee is required to begin work at his usual working place and ends when he ceases at such usual working place.

9. For a judgment or decree declaring and adjudging that the "worktime" of plaintiff's underground employees should be computed and compensated for upon the basis of work done at their usual working places, excluding the travel time as such in going to and from such working place.

9(a) For a judgment or decree declaring and adjudging that the "worktime" of plaintiff's underground employees should be computed and compensated for upon the face to face basis.

9(b) For a judgment or decree declaring and adjudging that the plaintiff is not indebted to its underground employees for time spent in traveling from the surface to their working places and in returning from such working places to the surface.

9(c) For a judgment or decree declaring and adjudging that the time spent by plaintiff's underground employees in traveling from the portal or entrance of plaintiff's mines to their underground usual working places and in returning from such working places to the portal or entrance of the mines in cases where such travel is attended only by the carrying by the employees of the lamp and the carbide or other lighting equipment, is not worktime within the meaning of the Fair Labor Standards Act of 1938 and is not to be included in the "Workweek" within the meaning of said Fair Labor Standards Act.

9(d) For a judgment or decree declaring and adjudging that the travel time spent by the plaintiff's underground employees in going from the portal or entrance of the mine to their usual working places and in returning from such working places to the portal or entrance of the mine at the end of the shift, where, during such travel time the employees only take with them the lamp and the carbide or other lighting appliance and perform no service on behalf of the employer during such travel time and receive no instructions and directions with respect to their work during such interval of travel, is not to be included in the "workweek" for purposes of compensation, within the meaning of the Fair Labor Standards Act of 1938.

10. For a declaratory judgment judicially construing the Fair Labor Standards Act of 1938 and Section 7 thereof, insofar as it relates to the underground employees of the plaintiff, so as to find and declare that it was the intention of the Congress in the enactment of Section 7 of the Fair Labor Standards Act of 1938 (considered in its application to plaintiff's underground employees, and under the pleadings and proof herein) that the "workweek" of plaintiff's underground employees consists only of the time actually spent by such underground employees in working at and around their usual working places.

11. For a declaratory judgment judicially construing the Fair Labor Standards Act of 1938 and Section 7 thereof, insofar as it relates to the underground employees of the plaintiff, so as to find and declare that it was the intention of the Congress in the enactment of Section 7 of the Fair Labor Standards Act of 1938 (considered in its application to plaintiff's underground employees, and under the pleadings and proof herein) that the "workweek" of plaintiff's underground employees should not include any time of its underground employees embracing (without any physical work or service for the plaintiff being done by such employees during such times):

(a) Any time spent in the bath house;

(b) Any time spent in going from and to the bath house to and from the portal;

(c) Any time spent in being transported from and to the portal to and from the underground manloading station;

(d) Any time spent in walking to and from their usual working places from and to the underground manloading station;

(e) Any time during the thirty-minute lunch period.

12. For a declaratory judgment judicially construing the Fair Labor Standards Act of 1938 and Section 7 thereof, insofar as it relates to the underground employees of the plaintiff, so as to find and declare that it was the intention of the Congress in the enactment of Section 7 of the Fair Labor Standards Act of 1938 (considered in its application to plaintiff's underground employees, and under the pleadings and proof herein) that, in computing the "workweek" of the underground employees of the plaintiff, the "workweek" of such underground employees should not include all of the time of such underground employees spent underground.

13. For a declaratory judgment judicially construing the Fair Labor Standards Act of 1938 and Section 7 thereof, insofar as it relates to the underground employees of the plaintiff, so as to find and declare that it was the intention of the Congress in the enactment of Section 7 of the Fair Labor Standards Act of 1938 (considered in its application to plaintiff's underground employees, and under the pleadings and proof herein) that the "workweek" of the underground employees of the plaintiff

should not be computed so as to include as time worked all of the time spent by such underground employees in traveling from and to the portal of the mine.

14. For a declaratory judgment judicially construing the Fair Labor Standards Act of 1938 and Section 7 thereof, insofar as it relates to the underground employees of the plaintiff, so as to find and declare that it was not the intention of the Congress in the enactment of Section 7 of the Fair Labor Standards Act of 1938 (considered in its application to plaintiff's underground employees, and under the pleadings and proof herein) that in computing the "workweek", the work day of plaintiff's underground employees should start when the employee reported at or near the portal of the mine and end when he reached the end of the shift.

15. For a declaratory judgment judicially construing the Fair Labor Standards Act of 1938 and Section 7 thereof, insofar as it relates to the underground employees of the plaintiff, so as to find and declare that it was not the intention of the Congress in the enactment of Section 7 of the Fair Labor Standards Act of 1938 (considered in its application to plaintiff's underground employees, and under the pleadings and proof herein) that in computing the "workweek" the work day of plaintiff's underground employees should start when the employee reported at or near the portal of the mine and end when he reached the portal at the end of the shift, unless such employees during the time of being transported or walking to and from their working place were required or suffered or permitted by the plaintiff to carry tools or supplies, receive instructions in reference to their work or perform some other work or service for the plaintiff aside from their transportation or walking to and from their usual working places.

16. For a declaratory judgment judicially construing the Fair Labor Standards Act of 1938 and Section 7 thereof, insofar as it relates to the underground employees of the plaintiff, so as to find and declare that it was not the intention of the Congress in the enactment of Section 7 of the Fair Labor Standards Act of 1938 (considered in its application to plaintiff's underground employees, and under the pleadings and proof herein) that, in computing the "workweek" of the underground employees of the plaintiff, the "workweek" of such underground employees should include all of the time of such underground employees spent underground.

17. For a declaratory judgment judicially construing the Fair Labor Standards Act of 1938 and Section 7 thereof, insofar as it relates to the underground employees of the plaintiff, so as to find and declare that it was not the intention of the Congress in the enactment of Section 7 of the Fair Labor Standards Act of 1938 (considered in its application to plaintiff's underground employees, and under the pleadings and proof herein) that the "workweek" of the underground employees of the plaintiff should be computed so as to include as time worked all of the time spent by such underground employees in traveling from and to the portal of the mine.

18. For a declaratory judgment judicially construing the Fair Labor Standards Act of 1938 and Section 7 thereof, insofar as it relates to the underground employees of the plaintiff, so as to find and declare that it was the intention of the Congress in the enactment of Section 7 of the Fair Labor Standards Act of 1938 (considered in its application to plaintiff's underground employees, and under the pleadings and proof herein) that the time consumed by the underground employees of the plaintiff in walking from the underground manloading station to their usual working places and back again at the end of the

shift should not be computed as a part of the "workweek" of such employees.

19. For a declaratory judgment judicially construing the Fair Labor Standards Act of 1938 and Section 7 thereof, insofar as it relates to the underground employees of the plaintiff, so as to find and declare that it was the intention of the Congress in the enactment of Section 7 of the Fair Labor Standards Act of 1938 (considered in its application to plaintiff's underground employees, and under the pleadings and proof herein) that the time consumed by the underground employees of the plaintiff in walking from the underground manloading station to their usual working places and back again at the end of the shift should not be computed as a part of the "workweek" of such employlees, unless such employees during such time were required or suffered or permitted by the plaintiff to carry tools or supplies, receive instructions in reference to their work, or perform some work or service for the plaintiff aside from their walking to and from their usual working places from and to the underground manloading station.

20. For a declaratory judgment judicially construing the Fair Labor Standards Act of 1938 and Section 7 thereof, insofar as it relates to the underground employees of the plaintiff, so as to find and declare that it was the intention of the Congress in the enactment of Section 7 of the Fair Labor Standards Act of 1938 (considered in its application to plaintiff's underground employees, and under the pleadings and proof herein) that the time spent by the underground employees of the plaintiff in being transported from the portal of the mine to the underground manloading station should not be computed as a part of the "workweek" of such employees.

21. For a declaratory judgment judicially construing the Fair Labor Standards Act of 1938 and Section 7 thereof, insofar as it relates to the underground employees of the plaintiff, so as to find and declare that it was the intention of the Congress in the enactment of Section 7 of the Fair Labor Standards Act of 1938 (considered in its application to plaintiff's underground employees, and under the pleadings and proof herein) that the time spent by the underground employees of the plaintiff in being transported from the portal of the mine to the underground manloading station should not be computed as a part of the workweek, unless such employees during the time of being transported from the portal of the mine to the underground manloading station were required or suffered or permitted by the plaintiff to carry tools or supplies, receive instructions in reference to their work, or perform some other work or service for the plaintiff aside and apart from their being transported from the portal of the mine to the underground manloading station.

22. For a declaratory judgment judicially construing the Fair Labor Standards Act of 1938 and Section 7 thereof, insofar as it relates to the underground employees of the plaintiff, so as to find and declare that it was the intention of the Congress in the enactment of Section 7 of the Fair Labor Standards Act of 1938 (considered in its application to plaintiff's underground employees, and under the pleadings and proof herein) that the time spent by the underground employees of the plaintiff in being transported from the underground manloading station to the portal of the mine should not be computed as a part of the "workweek."

23. For a declaratory judgment judicially construing the Fair Labor Standards Act of 1938 and Section 7 thereof, insofar as it relates to the underground employees of the plaintiff, so as to find and declare that it was the in-

tention of the Congress in the enactment of Section 7 of the Fair Labor Standards Act of 1938 (considered in its application to plaintiff's underground employees, and under the pleadings and proof herein) that the time spent by the underground employees of the plaintiff in being transported from the underground manloading station to the portal of the mine should not be computed as a part of the "workweek", unless such employees during the time of being transported from the underground manloading station to the portal of the mine were required or suffered or permitted by the plaintiff to carry tools or supplies, receive instructions in reference to their work or perform some work or service for the plaintiff aside and apart from their being transported from the underground manloading station to the portal.

24. For a declaratory judgment judicially construing the Fair Labor Standards Act of 1938 and Section 7 thereof, insofar as it relates to the underground employees of the plaintiff, so as to find and declare that it was the intention of the Congress in the enactment of Section 7 of the Fair Labor Standards Act of 1938 (considered in its application to plaintiff's underground employees, and under the pleadings and proof herein) that the "workweek" of the underground employees of the plaintiff should not be computed so as to include the aggregate of the time spent by plaintiff's underground mining employees on the surface in obtaining and returning lamps, carbide, and tools and in checking in and out.

25. For a declaratory judgment judicially construing the Fair Labor Standards Act of 1938 and Section 7 thereof, insofar as it relates to the underground employees of the plaintiff, so as to find and declare that it was the intention of the Congress in the enactment of Section 7 of the Fair Labor Standards Act of 1938 (considered in its application to plaintiff's underground employees, and

under the pleadings and proof herein) that in computing the "workweek" of plaintiff's underground service employees, their work days would be computed as beginning when they report for work in that place in plaintiff's mine where their work under their immediate supervisor actually begins, and should not be computed as including any portion of the time which they spend in being transported or in walking to such place.

26. For a declaratory judgment judicially construing the Fair Labor Standards Act of 1938 and Section 7 thereof, insofar as it relates to the underground employees of the plaintiff, so as to find and declare that it was the intention of the Congress in the enactment of Section 7 of the Fair Labor Standards Act of 1938 (considered in its application to plaintiff's underground employees, and under the pleadings and proof herein) that in computing the "workweek" of plaintiff's underground service employees, their work days should be computed as beginning when they report for work in that place in plaintiff's mine where their work under their immediate supervisor actually begins, and should not be computed as including any portion of the time which they spend in being transported or in walking to such place, unless such employees during the time of being transported or walking to and from such place were required or suffered or permitted by the plaintiff to carry tools or supplies, receive instructions in reference to their work, or perform some work or service for the plaintiff aside from their transportation or walking to and from such place.

27. For a declaratory judgment judicially construing the Fair Labor Standards Act of 1938 and Section 7 thereof, insofar as it relates to the underground employees of the plaintiff, so as to find and declare that it was the intention of the Congress in the enactment of Section 7 of the Fair Labor Standards Act of 1938 (considered in its

application to plaintiff's underground employees, and under the pleadings and proof herein) that in computing the "workweek" of plaintiff's underground service employees, the work day of such employees should be computed as beginning when they reported for work in that place in plaintiff's mine where their work under their immediate supervisor actually began, and should not be computed as including any portion of the time which they spent in being transported or in walking to and from such place, unless they were required or suffered or permitted by the plaintiff during such time to carry tools or supplies, receive instructions, or engage in some work or service for the plaintiff apart from or in addition to being transported or walking to and from such working place.

28. For a declaratory judgment judicially construing the Fair Labor Standards Act of 1938 and Section 7 thereof, insofar as it relates to the underground employees of the plaintiff, so as to find and declare that it was the intention of the Congress in the enactment of Section 7 of the Fair Labor Standards Act of 1938 (considered in its application to plaintiff's underground employees, and under the pleadings and proof herein) that, in computing the "workweek" of plaintiff's underground productive employees, the work day of such employees should be computed as beginning when they reported for work at their usual working place in plaintiff's mine and where their work under their immediate supervisor actually began, and should not be computed as including any portion of the time spent in being transported or in walking to and from such place, unless they are required during such time, or suffered or permitted by the plaintiff to carry tools or supplies, receive instructions, or perform some work or service for the plaintiff.

29. For a declaratory judgment judicially construing the Fair Labor Standards Act of 1938 and Section 7 there-

of, insofar as it relates to the underground employees of the plaintiff, so as to find and declare that it was the intention of the Congress in the enactment of Section 7 of the Fair Labor Standards Act of 1938 (considered in its application to plaintiff's underground employees, and under the pleadings and proof herein) that, in computing the "workweek" of plaintiff's underground productive employees, the work day of such employees should be computed as ending when they left their usual working place in plaintiff's mine, and should not be computed as including any portion of the time spent in being transported or in walking from such usual working place, unless they are required during such time or suffered or permitted by the plaintiff to carry tools or supplies, receive instructions, or perform some work or service for the plaintiff.

30. For a declaratory judgment judicially construing the Fair Labor Standards Act of 1938 and Section 7 thereof, insofar as it relates to the underground employees of the plaintiff, so as to find and declare that it was the intention of the Congress in the enactment of Section 7 of the Fair Labor Standards Act of 1938 (considered in its application to plaintiff's underground employees, and under the pleadings and proof herein) that, in computing the "workweek" of the underground employees of the plaintiff the time spent by them in depositing their checks on or before entering the mine and in taking them up upon their exit from the mine should not be included as a part of the "workweek."

31. For a declaratory judgment judicially construing the Fair Labor Standards Act of 1938 and Section 7 thereof, insofar as it relates to the underground employees of the plaintiff, so as to find and declare that it was the intention of the Congress in the enactment of Section 7 of the Fair Labor Standards Act of 1938 (considered in its application to plaintiff's underground employees, and

under the pleadings and proof herein) that, in computing the "workweek" of plaintiff's underground employees, the mere fact that plaintiff's underground employees in being required or suffered or permitted by the plaintiff to be transported from and to the portal of the mine to and from the underground manloading station were thereby made subject to the hazards of being injured as a proximate result of the character or condition of the vehicle furnished by plaintiff for such transportation, or subject to other hazards usually incident to underground employees, did not in and of itself require the time spent in such transportation to be computed as a part of the "workweek" of such employees.

32. For a declaratory judgment judicially construing the Fair Labor Standards Act of 1938 and Section 7 thereof, insofar as it relates to the underground employees of the plaintiff, so as to find and declare that it was the intention of the Congress in the enactment of Section 7 of the Fair Labor Standards Act of 1938 (considered in its application to plaintiff's underground employees, and under the pleadings and proof herein) that, in computing the "workweek" of plaintiff's underground employees, the mere fact that plaintiff's underground employees in being required or suffered or permitted by the plaintiff to walk from the underground manloading station to their usual place of work and from their usual place of work to the underground manloading station were thereby made subject to the hazard of being injured as a proximate result of falling rock, or other hazards incident to underground mining did not in and of itself require the time spent in walking to and from such places to be computed as a part of the "workweek" of such employees.

33. For a declaratory judgment judicially construing the Fair Labor Standards Act of 1938 and Section 7 thereof, insofar as it relates to the underground employees of

the plaintiff, so as to find and declare that it was the intention of the Congress in the enactment of Section 7 of the Fair Labor Standards Act of 1938 (considered in its application to plaintiff's underground employees, and under the pleadings and proof herein) that the time spent by the underground employees of the plaintiff in traveling from the portal or entrance of its mines to their usual working places, and in returning from such working places to the entrance or portal of the mines, should not be computed as work time within the meaning of the Fair Labor Standards Act, and that in determining the number of hours worked in any "workweek" such time should not be included.

34. For a declaratory judgment judically construing the Fair Labor Standards Act of 1938 and Section 7 thereof, insofar as it relates to the underground employees of the plaintiff, so as to find and declare that it was the intention of the Congress in the enactment of Section 7 of the Fair Labor Standards Act of 1938 (considered in its application to plaintiff's underground employees, and under the pleadings and proof herein) that the "workweek", within the meaning of the Fair Labor Standards Act of 1938, Section 7, should not include travel time, as such, consumed by plaintiff's underground employees in going from the portal or entrance of the mine to their usual working places, and in returning therefrom to such portal or entrance.

35. For a declaratory judgment judicially construing the Fair Labor Standards Act of 1938 and Section 7 thereof, insofar as it relates to the underground employees of the plaintiff, so as to find and declare that it was the intention of the Congress in the enactment of Section 7 of the Fair Labor Standards Act of 1938 (considered in its application to plaintiff's underground employees, and under the pleadings and proof herein) that the "workweek,"

within the meaning of the Fair Labor Standards Act of 1938, Section 7, should not include travel time, per se, consumed by plaintiff's underground employees in going from the portal or entrance of the mine to their usual working places, and in returning therefrom to such portal or entrance.

36. For a declaratory judgment judicially construing the Fair Labor Standards Act of 1938 and Section 7 thereof, insofar as it relates to the underground employees of the plaintiff, so as to find and declare that it was the intention of the Congress in the enactment of Section 7 of the Fair Labor Standards Act of 1938 (considered in its application to plaintiff's underground employees, and under the pleadings and proof herein) that the time spent by any underground employee of the plaintiff in going from the portal or entrance of the mine to his usual working place, and in returning from such usual place to the portal or entrance, should not constitute work time within the meaning of Section 7 of the Fair Labor Standards Act of 1938, unless such employee during the time in which he is traveling from the portal to the working place and returning does some work for the plaintiff other than taking with him his lights and carbide.

37. For a judgment or decree in its favor and against the defendants, separately and severally, determining and declaring that the plaintiff is not indebted to the defendant and its underground mining employees as compensation for any time spent by them since the enactment of the Act in the bath house, or in going from and to the bath house to and from the portal, or to and from the underground manloading station from or to the portal, or to and from the actual working places of the underground employees from or to the underground manloading station (during which time said employees perform no physical labor or service in connection with their actual work).

The above motion, and each separate and several portion, thereof, is made separately and severally as to each of the plaintiff's ore mines, viz, Sloss Mines and Ruffner, and all of the underground employees working in each of said mines.

E. L. ALL,
S. M. BRONAUGH,
BORDEN BURR,
Attorneys for Plaintiff, Sloss-Sheffield Steel & Iron Company.

Address: Birmingham, Alabama.

I hereby certify that a copy of the foregoing has been served upon Crampton Harris, J. Q. Smith, and Jerome A. Cooper, attorneys for the respective defendants, on this the 6th day of September, 1941.

E. L. ALL,
Of Attorneys for Plaintiff,
Sloss-Sheffield Steel & Iron Company.

Address: Birmingham, Alabama.

Filed September 6, 1941.

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MOTION OF PETITIONER-PLAINTIFF REPUBLIC STEEL CORPORATION FOR JUDGMENT OR DECREE IN ITS FAVOR.

515 (Civil Action No. 5234.)

Comes plaintiff in the above entitled cause, and moved the Court, separately and severally, as follows:

1. For a judgment or decree in its favor and against the defendants, separately and severally.

2. For a judgment or decree in its favor and against the defendants, separately and severally, in accordance with its petition and prayer as set forth in Section X of its complaint as last amended.

3. For a judgment or decree in its favor and against the defendants, separately and severally, in accordance with its petition and prayer as set forth in sub-section A of Section X of its complaint as last amended.

4. For a judgment or decree in its favor and against the defendants, separately and severally, in accordance with its petition and prayer as set forth in sub-section B of Section X of its complaint as last amended.

5. For a judgment or decree in its favor and against the defendants, separately and severally, in accordance with its petition and prayer as set forth in sub-section C of Section X of its complaint as last amended.

6. For a judgment or decree in its favor and against the defendants, separately and severally, in accordance with its petition and prayer as set forth in sub-section D of Section X of its complaint as last amended.

7. For a judgment or decree in its favor and against the defendants, separately and severally, in accordance with its petition and prayer as set forth in sub-section E of Section X of its complaint as last amended.

8. For a judgment or decree in its favor and against the defendants, separately and severally, in accordance with its petition and prayer as set forth in sub-section F of Section X of its complaint as last amended.

9. For a judgment or decree in its favor and against the defendants, separately and severally, determining and

declaring that the plaintiff is not indebted to the defendants and its underground mining employees as compensation for any time spent by them since the enactment of the Act in the bath house, or in going from and to the bath house to and from the portal, or to and from the underground manloading station from or to the portal, or to and from the actual working places of the underground employees from or to the underground manloading station (during which time said employees perform no physical labor or service in connection with their actual work).

10. For a declaratory judgment judicially construing the Fair Labor Standards Act of 1938 and Section 7 thereof, in so far as it relates to the underground employees of the plaintiff, so as to find and declare that it was the intention of the Congress in the enactment of Section 7 of the Fair Labor Standards Act of 1938 (considered in its application to plaintiff's underground employees and under the pleadings and proof herein) that the "workweek" of plaintiff's underground employees should not include any portion of their time spent in being transported or walking to and from their usual working places and while not engaged in any physical work or service for the plaintiff.

11. For a declaratory judgment judicially construing the Fair Labor Standards Act of 1938 and Section 7 thereof, in so far as it relates to the underground employees of the plaintiff, so as to find and declare that it was the intention of the Congress in the enactment of Section 7 of the Fair Labor Standards Act of 1938 (considered in its application to plaintiff's underground employees, and under the pleadings and proof herein) that the "workweek" of plaintiff's underground employees consists only of the time actually spent by such underground employees in working at and around their usual working places.

12. For a declaratory judgment judicially construing the Fair Labor Standards Act of 1938 and Section 7 there-

of, in so far as it relates to the underground employees of the plaintiff, so as to find and declare that it was the intention of the Congress in the enactment of Section 7 of the Fair Labor Standards Act of 1938 (considered in its application to plaintiff's underground employees, and under the pleadings and proof herein) that the "workweek" of plaintiff's underground employees should not include any time of its underground employees embracing (without any physical work or service for the plaintiff being done by such employees during such times):

(a) Any time spent in the bath house;

(b) Any time spent in going from and to the bath house to and from the portal;

(c) Any time spent in being transported from and to the portal to and from the underground manloading station;

(d) Any time spent in walking to and from their usual working places from and to the underground manloading station;

(e) Any time during the thirty-minute lunch period.

13. For a declaratory judgment judicially construing the Fair Labor Standards Act of 1938 and Section 7 thereof, in so far as it relates to the underground employees of the plaintiff, so as to find and declare that it was the intention of the Congress in the enactment of Section 7 of the Fair Labor Standards Act of 1938 (considered in its application to plaintiff's underground employees, and under the pleadings and proof herein) that, in computing the "workweek" of the underground employees of the plaintiff, the "workweek" of such underground employees should not include all of the time of such underground employees spent underground.

14. For a declaratory judgment judicially construing the Fair Labor Standards Act of 1938 and Section 7 thereof, in so far as it relates to the underground employees of the plaintiff, so as to find and declare that it was the intention of the Congress in the enactment of Section 7 of the Fair Labor Standards Act of 1938 (considered in its application to plaintiff's underground employees, and under the pleadings and proof herein) that the "workweek" of the underground employees of the plaintiff should not be computed so as to include as time worked all of the time spent by such underground employees in traveling from and to the portal of the mine.

15. For a declaratory judgment judicially construing the Fair Labor Standards Act of 1938 and Section 7 thereof, in so far as it relates to the underground employees of the plaintiff, so as to find and declare that it was not the intention of the Congress in the enactment of Section 7 of the Fair Labor Standards Act of 1938 (considered in its application to plaintiff's underground employees, and under the pleadings and proof herein) that, in computing the "workweek", the work day of plaintiff's underground employees should start when the employees reported at or near the portal of the mine and when they reached the portal at the end of the shift.

16. For a declaratory judgment judicially construing the Fair Labor Standards Act of 1938 and Section 7 thereof, in so far as it relates to the underground employees of the plaintiff, so as to find and declare that it was not the intention of the Congress in the enactment of Section 7 of the Fair Labor Standards Act of 1938 (considered in its application to plaintiff's underground employees, and under the pleadings and proof herein) that, in computing the "workweek", the work day of plaintiff's underground employees should start when the employees reported at or near the portal of the mine and end when they reached

the portal at the end of the shift, unless such employees during the time of being transported or walking to and from their working place were required or suffered or permitted by the plaintiff to carry tools or supplies, receive instructions in reference to their work or perform some work or service for the plaintiff aside from their transportation or walking to and from their usual working places.

17. For a declaratory judgment judicially construing the Fair Labor Standards Act of 1938 and Section 7 thereof, in so far as it relates to the underground employees of the plaintiff, so as to find and declare that it was not the intention of the Congress in the enactment of Section 7 of the Fair Labor Standards Act of 1938 (considered in its application to plaintiff's underground employees, and under the pleadings and proof herein) that, in computing the "workweek" of the underground employees of the plaintiff, the "workweek" of such underground employees should include all of the time of such underground employees spent underground.

18. For a declaratory judgment judicially construing the Fair Labor Standards Act of 1938 and Section 7 thereof, in so far as it relates to the underground employees of the plaintiff, so as to find and declare that it was not the intention of the Congress in the enactment of Section 7 of the Fair Labor Standards Act of 1938 (considered in its application to plaintiff's underground employees, and under the pleadings and proof herein) that the "workweek" of the underground employees of the plaintiff should be computed so as to include as time worked all of the time spent by such underground employees in traveling from and to the portal of the mine.

19. For a declaratory judgment judicially construing the Fair Labor Standards Act of 1938 and Section 7 there-

of, in so far as it relates to the underground employees of the plaintiff, so as to find and declare that it was the intention of the Congress in the enactment of Section 7 of the Fair Labor Standards Act of 1938 (considered in its application to plaintiff's underground employees, and under the pleadings and proof herein) that the time consumed by the underground employees of the plaintiff in walking from the underground manloading station to their usual working places and back again at the end of the shift should not be computed as a part of the "workweek" of such employees.

20. For a declaratory judgment, judicially construing the Fair Labor Standards Act of 1938 and Section 7 thereof, in so far as it relates to the underground employees of the plaintiff, so as to find and declare that it was the intention of the Congress in the enactment of Section 7 of the Fair Labor Standards Act of 1938 (considered in its application to plaintiff's underground employees, and under the pleadings and proof herein) that the time consumed by the underground employees of the plaintiff in walking from the underground manloading station to their usual working places and back again at the end of the shift should not be computed as a part of the "workweek" of such employees, unless such employees during such time were required or suffered or permitted by the plaintiff to carry tools or supplies, receive instructions in reference to their work, or perform some work or service for the plaintiff aside from their walking to and from their usual working places from and to the underground manloading station.

21. For a declaratory judgment judicially construing the Fair Labor Standards Act of 1938 and Section 7 thereof, in so far as it relates to the underground employees of the plaintiff, so as to find and declare that it was the intention of the Congress in the enactment of Section 7 of

the Fair Labor Standards Act of 1938 (considered in its application to plaintiff's underground employees, and under the pleadings and proof herein) that the time spent by the underground employees of the plaintiff in being transported from the portal of the mine to the underground manloading station should not be computed as a part of the "workweek" of such employees.

22. For a declaratory judgment judicially construing the Fair Labor Standards Act of 1938 and Section 7 thereof, in so far as it relates to the underground employees of the plaintiff, so as to find and declare that it was the intention of the Congress in the enactment of Section 7 of the Fair Labor Standards Act of 1938 (considered in its application to plaintiff's underground employees, and under the pleadings and proof herein) that the time spent by the underground employees of the plaintiff in being transported from the portal of the mine to the underground manloading station should not be computed as a part of the workweek, unless such employees during the time of being transported from the portal of the mine to the underground manloading station were required or suffered or permitted by the plaintiff to carry tools or supplies, receive instructions in reference to their work, or perform some work or service for the plaintiff aside and apart from their being transported from the portal of the mine to the underground manloading station.

23. For a declaratory judgment judicially construing the Fair Labor Standards Act of 1938 and Section 7 thereof, in so far as it relates to the underground employees of the plaintiff, so as to find and declare that it was the intention of the Congress in the enactment of Section 7 of the Fair Labor Standards Act of 1938 (considered in its application to plaintiff's underground employees, and under the pleadings and proof herein) that the time spent by the underground employees of the plaintiff in being

transported from the underground manloading station to the portal of the mine should not be computed as a part of the "workweek".

24. For a declaratory judgment judicially construing the Fair Labor Standards Act of 1938 and Section 7 thereof, in so far as it relates to the underground employees of the plaintiff, so as to find and declare that it was the intention of the Congress in the enactment of Section 7 of the Fair Labor Standards Act of 1938 (considered in its application to plaintiff's underground employees, and under the pleadings and proof herein) that the time spent by the underground employees of the plaintiff in being transported from the underground manloading station to the portal of the mine should not be computed as a part of the "workweek", unless such employees during the time of being transported from the underground manloading station to the portal of the mine were required or suffered or permitted by the plaintiff to carry tools or supplies, receive instructions in reference to their work or perform some work or service for the plaintiff aside from their being transported from the underground manloading station to the portal.

25. For a declaratory judgment judicially construing the Fair Labor Standards Act of 1938 and Section 7 thereof, in so far as it relates to the underground employees of the plaintiff, so as to find and declare that it was the intention of the Congress in the enactment of Section 7 of the Fair Labor Standards Act of 1938 (considered in its application to plaintiff's underground employees, and under the pleadings and proof herein) that the "workweek" of the underground employees of the plaintiff should not be computed so as to include the aggregate of the time spent by plaintiff's underground mining employees on the surface in obtaining and returning lamps, carbide, and tools and in checking in and out.

26. For a declaratory judgment judicially construing the Fair Labor Standards Act of 1938 and Section 7 thereof, in so far as it relates to the underground employees of of the plaintiff, so as to find and declare that it was the intention of the Congress in the enactment of Section 7 of the Fair Labor Standards Act of 1938 (considered in its application to plaintiff's underground employees, and under the pleadings and proof herein) that the "workweek" of the underground employees of the plaintiff during the period of time from October 24, 1938, to October 24, 1939, should not be computed so as to include the aggregate of the time spent by plaintiff's underground mining employees on the surface in obtaining and returning lamps, carbide, and tools and in checking in and out, unless the aggregate of such time and the underground working time of such employees exceeded the aggregate of forty-four hours spent by such employee during such workweek.

27. For a declaratory judgment judicially construing the Fair Labor Standards Act of 1938 and Section 7 thereof, in so far as it relates to the underground employees of the plaintiff, so as to find and declare that it was the intention of the Congress in the enactment of Section 7 of the Fair labor Standards Act of 1938 (considered in its application to plaintiff's underground employees, and under the pleadings and proof herein) that the "workweek" of the underground employees of plaintiff during the period of time from October 24, 1939, to October 24, 1940, should not be computed so as to include the aggregate of the time spent by plaintiff's underground mining employees on the surface in obtaining and returning lamps, carbide, and tools and in checking in and out, unless the aggregate of such time and the underground working time of such employees exceeded the aggregate of forty-two hours spent by such employees during such workweek.

28. For a declaratory judgment judicially construing the Fair Labor Standards Act of 1938 and Section 7 there-

of, in so far as it relates to the underground employees of the plaintiff, so as to find and declare that it was the intention of the Congress in the enactment of Section 7 of the Fair Labor Standards Act of 1938 (considered in its application to plaintiff's underground employees, and under the pleadings and proof herein) that the "workweek" of the underground employees of plaintiff during the period of time from October 24, 1940, to May 1, 1941, should not be computed so as to include the aggregate of the time spent by plaintiff's underground mining employees on the surface in obtaining and returning lamps, carbide, and tools and in checking in and out, unless the aggregate of such time and the underground working time of such employees exceeded the aggregate of forty hours spent by such employees during such "workweek".

29. For a declaratory judgment judicially construing the Fair Labor Standards Act of 1938 and Section 7 thereof, in so far as it relates to the underground employees of the plaintiff, so as to find and declare that it was the intention of Congress in the enactment of Section 7 of the Fair Labor Standards Act of 1938 (considered in its application to plaintiff's underground employees, and under the pleadings and proof therein) that, in computing the "workweek" of plaintiff's underground service employees, their work days should be computed as beginning when they report for work in that place in plaintiff's mine where their work under their immediate supervisor actually begins and should not be computed as including any portion of the time which they spend in being transported or in walking to such place.

30. For a declaratory judgment judicially construing the Fair Labor Standards Act of 1938 and Section 7 thereof, in so far as it relates to the underground employees of the plaintiff, so as to find and declare that it was the intention of the Congress in the enactment of Section 7 of

the Fair Labor Standards Act of 1938 (considered in its application to plaintiff's underground employees, and under the pleadings and proof herein) that, in computing the "workweek" of plaintiff's underground service employees, their work days should be computed as beginning when they report for work in that place in plaintiff's mine where their work under their immediate supervisor actually begins, and should not be computed as including any portion of the time which they spend in being transported or in walking to such place, unless such employees during the time of being transported or walking to and from such place was required or suffered or permitted by the plaintiff to carry tools or supplies, receive instructions in reference to his work, or perform some work or service for the plaintiff aside from his transportation or walking to and from such place.

31. For a declaratory judgment judicially construing the Fair Labor Standards Act of 1938 and section 7 thereof, in so far as it relates to the underground employees of the plaintiff, so as to find and declare that it was the intention of the Congress in the enactment of Section 7 of the Fair Labor Standards Act of 1938 (considered in its application to plaintiff's underground employees, and under the pleadings and proof herein) that, in computing the "workweek" of plaintiff's underground service employees, the work day of such employees should be computed as beginning when they reported for work in that place in plaintiff's mine where their work under their immediate supervisor actually began, and should not be computed as including any portion of the time which they spent in being transported or in walking to and from such place, unless they were required or suffered or permitted by the plaintiff during such time to carry tools or supplies, receive instructions, or engage in some work or service for the plaintiff apart from or in addition to being transported or walking to and from such working place.

32. For a declaratory judgment judicially construing the Fair Labor Standards Act of 1938 and Section 7 thereof, in so far as it relates to the underground employees of the plaintiff, so as to find and declare that it was the intention of the Congress in the enactment of Section 7 of the Fair Labor Standards Act of 1938 (considered in its application to plaintiff's underground employees, and under the pleadings and proof herein) that, in computing the "workweek" of plaintiff's underground productive employees, the work day of such employees should be computed as beginning when they reported for work at their usual working place in plaintiff's mine and where their work under their immediate supervisor actually began, and should not be computed as including any portion of the time spent in being transported or in walking to and from such place, unless they are required during such time or suffered or permitted by the plaintiff to carry tools or supplies, receive instructions, or perform some work or service for the plaintiff.

33. For a declaratory judgment judicially construing the Fair Labor Standards Act of 1938 and Section 7 thereof, in so far as it relates to the underground employees of the plaintiff, so as to find and declare that it was the intention of the Congress in the enactment of Section 7 of the Fair Labor Standards Act of 1938 (considered in its application to plaintiff's underground employees, and under the pleadings and proof herein) that, in computing the "workweek" of plaintiff's underground productive employees, the work day of such employees should be computed as ending when they left their usual working place in plaintiff's mine, and should not be computed as including any portion of the time spent in being transported or in walking from such usual working place, unless they are required during such time or suffered or permitted by the plaintiff to carry tools or supplies, receive instructions, or perform some work or service for the plaintiff.

34. For a declaratory judgment judicially construing the Fair Labor Standards Act of 1938 and Section 7 thereof, in so far as it relates to the underground employees of the plaintiff, so as to find and declare that it was the intention of the Congress in the enactment of Section 7 of the Fair Labor Standards Act of 1938 (considered in its application to plaintiff's underground employees, and under the pleadings and proof herein) that, in computing the "workweek" of the underground employees of the plaintiff the time spent by them in depositing their checks on or before entering the mine and in taking them up upon their exit from the mine should not be included as a part of the "workweek".

35. For a declaratory judgment judicially construing the Fair Labor Standards Act of 1938 and Section 7 thereof, in so far as it relates to the underground employees of the plaintiff, so as to find and declare that it was the intention of the Congress in the enactment of Section 7 of the Fair Labor Standards Act of 1938 (considered in its application to plaintiff's underground employees, and under the pleadings and proof herein) that, in computing the "workweek" of plaintiff's underground employees, the mere fact that plaintiff's underground employees in being required or suffered or permitted by the plaintiff to be transported from and to the portal of the mine to and from the underground manloading station were thereby made subject to the hazards of being injured as a proximate result of the character or condition of the vehicle furnished by plaintiff for such transportation, or subject to other hazards usually incident to underground employees, did not in and of itself require the time spent in such transportation to be computed as a part of the "workweek" of such employees.

36. For a declaratory judgment judicially construing the Fair Labor Standards Act of 1938 and Section 7 there-

of, in so far as it relates to the underground employees of the plaintiff, so as to find and declare that it was the intention of the Congress in the enactment of Section 7 of the Fair Labor Standards Act of 1938 (considered in its application to plaintiff's underground employees, and under the pleadings and proof herein) that, in computing the "workweek" of plaintiff's underground employees, the mere fact that plaintiff's underground employees in being required or suffered or permitted by the plaintiff to walk from the underground manloading station to their usual place of work and from their usual place of work to the underground manloading station were thereby made subject to the hazard of being injured as a proximate result of falling rock, or other hazards incident to underground mining did not in and of itself require the time spent in walking to and from such places to be computed as a part of the "workweek" of such employees.

37. For a declaratory judgment judicially construing the Fair Labor Standards Act of 1938 and Section 7 thereof, in so far as it relates to the underground employees of the plaintiff, so as to find and declare that it was the intention of the Congress in the enactment of Section 7 of the Fair Labor Standards Act of 1938 (considered in its application to plaintiff's underground employees, and under the pleadings and proof herein) that the time spent by the underground employees of the plaintiff in traveling from the portal or entrance of its mines to their usual working places, and in returning from such working places to the entrance or portal of the mines, should not be computed as work time within the meaning of the Fair Labor Standards Act, and that in determining the number of hours worked in any "workweek" such time should not be included.

38. For a declaratory judgment judicially construing the Fair Labor Standards Act of 1938 and Section 7 there-

of, in so far as it relates to the underground employees of the plaintiff, so as to find and declare that it was the intention of the Congress in the enactment of Section 7 of the Fair Labor Standards Act of 1938 (considered in its application to plaintiff's underground employees, and under the pleadings and proof herein) that the "workweek", within the meaning of the Fair Labor Standards Act of 1938, Section 7, should not include travel time, as such, consumed by plaintiff's underground employees in going from the portal or entrance of the mine to their usual working places, and in returning therefrom to such portal or entrance.

39. For a declaratory judgment judicially construing the Fair Labor Standards Act of 1938 and Section 7 thereof, in so far as it relates to the underground employees of the plaintiff, so as to find and declare that it was the intention of the Congress in the enactment of Section 7 of the Fair Labor Standards Act of 1938 (considered in its application to plaintiff's underground employees, and under the pleadings and proof herein) that the "workweek", within the meaning of the Fair Labor Standards Act of 1938, Section 7, should not include travel time, per se, consumed by plaintiff's underground employees in going from the portal or entrance of the mine to their usual working places, and in returning therefrom to such portal or entrance.

40. For a declaratory judgment judicially construing the Fair Labor Standards Act of 1938 and Section 7 thereof, in so far as it relates to the underground employees of the plaintiff, so as to find and declare that it was the intention of the Congress in the enactment of Section 7 of the Fair Labor Standards Act of 1938 (considered in its application to plaintiff's underground employees, and under the pleadings and proof herein) that the time spent by any underground employee of the plaintiff in going from the portal or entrance of the mine to his usual working

place, and in returning from such usual place to the portal or entrance, should not constitute work time within the meaning of Section 7 of the Fair Labor Standards Act of 1938, unless such employee during the time in which he is traveling from the portal to the working place and returning does some work for the plaintiff other than taking with him his lights and carbide.

The above motion, and each separate and several portion thereof, is made separately and severally as to:

(a) The Raimund mind of the plaintiff, and all of its underground employees working in such mine, and

(b) The Spalding mine of the plaintiff, and all of its underground employees working in such mine.

E. L. ALL,
BORDEN BURR,
Attorneys for Plaintiff, Tennessee Coal, Iron and Railroad Company.
Address: Birmingham, Alabama.

I hereby certify that a copy of the foregoing has been served upon Crampton Harris, J. Q. Smith, and Jerome A. Cooper, Attorneys for the respective defendants, on this the 5 day of September, 1941.

BORDEN BURR,
Attorneys for Plaintiff, Tennessee Coal, Iron and Railroad Company.
Address: Birmingham, Alabama.

Filed September 6, 1941.

532 FINDINGS OF FACT.

(Civil Actions Nos. 5232, 5233 and 5234.)

1.

Unless otherwise indicated, the following Findings of Fact relate to and cover the period between October 24, 1938, to May 1, 1941.

1 (a).

The amount in controversy herein exceeds $3,000.00.

2.

Petitioner Tennessee Coal, Iron and Railroad Company (hereinafter referred to as T. C. I.) is a corporation organized under the laws of the State of Tennessee, is a resident of the State of Tennessee, is authorized to transact business in the State of Alabama, has its principal place of business in Jefferson County, Alabama, and operates red ore mines in Jefferson County, Alabama. Petitioner Republic Steel Corporation (hereinafter referred to as Republic) is a corporation organized under the laws of the State of New Jersey, is a resident of the State of New Jersey, is authorized to transact business in the State of Alabama, has a principal place of business in Jefferson County, Alabama, and operates red ore mines in Jefferson County, Alabama. Petitioner Sloss-Sheffield Steel and Iron Company (hereinafter referred to as Sloss,) is a corporation organized under the laws of the State of New Jersey, is a resident of the State of New Jersey, is authorized to transact business in the State of Alabama, has its principal place of business in Jefferson County, Alabama, and operates red ore mines in Jefferson County, Alabama.

3.

The ore produced in these mines has been and is produced for use as an ingredient in iron and steel products which are sold and shipped to points outside of the State of Alabama.

4.

All named individual defendants are residents of Jefferson County, Alabama, with the exception of Philip B. Fleming, intervener, who is Administrator of the Wage and Hour Division, United States Department of Labor. The defendant organizations affiliated with the Congress of Industrial Organizations and the defendant organizations affiliated with the American Federation of Labor are labor unions whose memberships are composed of employees of plaintiffs' ore mines, and the defendants and the employees whom they represent are and have been engaged in substantially all of the underground occupations in the plaintiffs' red ore mines.

5.

During the approximately 60-years history of iron ore mining in the Birmingham, Alabama, district, plaintiffs' (or their predecessors') employees employed as red ore miners have been paid compensation upon a basis without regard to the number of hours spent daily by said employees at the face of the ore seam or at any specified place or station in the mines. This compensation has never been based upon any precise number of hours spent daily at the face of the seam or at any specified place or station in the mines.

6.

The employees of plaintiffs' red ore mines involved in this suit include both producing crews, who actually

blast, dig, and load ore, and company or service men who perform duties auxiliary and necessary to the activities of the producing crews. Unless otherwise specifically stated, these Findings and Conclusions of Law relate to and include both producing ore miners and company or service miners.

7.

The "usual working places" or underground stations of the company or service men occur throughout the mines and are not at the face of the seam.

8.

Until 1914 production men of T. C. I. were paid on a so-called "contract basis", under which the amount of the individual miner's compensation was determined by the amount of ore which his crew could load. If the crew during any shift failed to load and get out any tonnage of ore, the miners who constituted that crew received no compensation at all for that shift. The compensation of members of the crew for particular shifts, fluctuated up and down as the amount of ore loaded and gotten out during those shifts increased or decreased. The head miner or "contractor" was credited at a certain rate per ton with all tonnage produced by members of his crew, and each member of the crew had a specified tonnage rate. The amount of time consumed during a shift by a crew at the face of the seam did not determine the amount of compensation received by the members of the crew.

9.

During the period beginning 1914 to 1933 production men of T. C. I. were paid upon a "task basis" without regard to hours spent daily at any point, and under which

the method of payment remained on a tonnage basis and the number of hours spent by a miner daily at the face of the seam was immaterial so long as he produced his daily "task". The "task basis" was but a slight modification of the "contract basis"; under the "task basis", a member of a producing crew was paid according to the amount of ore produced by his crew and not according to the amount of time spent during a given shift at the face of the seam.

10.

From 1933 to May 1, 1941, production men's compensation at T. C. I. was determined upon a shift basis, not upon an hourly basis, and the method of determining compensation continued to fail to reflect the actual number of hours spent daily at the face of the seam. At Sloss, the employees were paid on the "contract basis," until 1934, and thereafter upon a similar tonnage basis; at Republic, the employees are still paid under the "contract system"; at both Sloss and Republic until May 1, 1941, the method of determining production men's compensation continued to fail to reflect the actual number of hours spent daily at the face of the seam.

11.

Company or service men have never been paid on a basis of the time actually spent at their underground stations.

12.

There has never been any custom under which plaintiffs paid their underground red ore mine employees—company or service men as well as producing miners—only and solely for time actually spent at their particular stations underground.

13.

Plaintiffs T. C. I. and Republic at no time prior to the commencement of this action entered into a contract between themselves and any union of their said ore mine employees certified by the National Labor Relations Board as an appropriate unit for collective bargaining.

14.

Prior to the enactment of the Fair Labor Standards Act of 1938 Plaintiffs' said employees made several efforts, which were unsuccessful, to obtain compensation for all, or a greater part, of the time expended daily by them after reporting at the mouth of the mine until they left the mouth of the mine at the end of the workday.

15.

Before they reached the mouth of the mine, plaintiffs' employees arrive on plaintiffs' property and ordinarily change to their work clothes in the bath house owned by the company. They then walk varying distances on company property from the bath house to the tally house at or near the portal of the mine where they report for duty.

16.

At the beginning of a shift, these employees reported for duty at the tally house at or near the mouth of the mines. Every employee of T. C. I. and Republic hangs up a check previously issued to him by the company. At Sloss, the employees regularly went from the bath house to the tally house and reported their presence to representatives of the company.

17.

Plaintiffs' employees occasionally obtain and return tools and frequently obtain carbide (at T. C. I. and Sloss) on the surface before entering the mine. At Republic, employees pick up a battery light, rented to them by the company, and turn the battery light in when they emerge from the mine at the end of a shift. Plaintiffs' employees daily spend a few moments checking in and out, and in obtaining the lamps without which their work at the face of the seam would be impossible.

18.

After reporting for duty at or near the mouth of the mine, these employees are daily subject to the receipt of instructions from plaintiffs relative to the duties of their employment. They are frequently given their first instructions of the day prior to entering the slope of the mine. The check-in board or the act of checking in at the tally house informs officials of plaintiffs that members of the respective crews have reported for work; and these employees are forbidden to enter plaintiffs' mines until their brass checks have been deposited or until they have been checked in at the tally house. At this point, vacancies in working crews are ordered filled by company officials; the crews or head miners are informed of any changes in their underground stations; the head miners are given advice about the operations of their underground stations; the head miner or crew foreman begins to assemble his crew, to fill any vacancies and to issue orders to its members; at Sloss, an official of the company checked the names of the men as they reported at the tally house.

19.

When these employees report at the mouth of the mine they are in their mining clothes and have their indispensable lamps. In the vehicle in which these employees are transported between the mouth of the mine and the underground man-loading station, the employees are subjected to discomfort, substantial changes in temperature, and are subjected to the risk of injury by collision with low points in the roof of the mine slopes or with projections from those roofs. The air in plaintiffs' mines is humid and malodorous, the ventilation relatively poor, and the heat increases with the descent into the mine.

20.

All employees were required by the companies to report at the mouth of the mines, at the beginning of a shift, in time to catch the vehicle on one of its trips scheduled by plaintiffs.

21.

Plaintiffs supervise, control, and prescribe the schedule of the vehicles on which the men are transported into and out of the mine, the speed of the vehicles, the loading of the men into them, the rules of conduct during the trips in and out; and require the men to ride rather than to walk. Company rules require certain employees to ride particular trips of the vehicles.

22.

In entering the vehicle for the descent or to be raised from the mine, on the way down and up, these employees are subject to disciplinary rules of the plaintiffs and are supervised by representatives or officials of the plaintiffs.

23.

During the time consumed walking between the underground man-loading station and the face of the seam and return, these employees are subject to disciplinary rules of the plaintiffs, and, en route between the man-loading station and the face, frequently carry tools and materials necessary for the mining of ore.

24.

In walking between the underground unloading station and the face of the seam and return, the employees encounter an increasingly warmer and humid atmosphere with the increasingly less effective ventilation. At points the walkers are required to stoop to avoid collision with the roof; footing is irregular, sometimes rough, sometimes wet and slippery, and sometimes marked by overhead uninsulated wires and pipes underfoot. The manways utilized in this walking involve grades of varying steepness. After negotiating the distance between underground man-loading station and the face of the seam, a miner is often wet with perspiration.

25.

From the time plaintiffs' employees enter the mouth of the mine until their exit from the mouth of the mine, they are subject to conditions peculiar to their occupation and employment in ore mines.

26.

Those employees who use brass checks pick up their checks when they reach the mouth of the mine at the end of the shift. From the mouth of the mine at the end of the

shift, plaintiffs' employees proceed on company property to the bath house, bathe and change from work clothes.

27.

The conditions of the slopes of plaintiffs 'mines, of the haulage-ways and walk-ways utilized by said employees in moving between the underground man-loading stations and the face of the seam and return, and the vehicles used to lower and raise plaintiffs' red ore miners, have remained substantially the same from October 24, 1938, until the present time.

28.

Subsequent to October 24, 1938, subsequent to October 24, 1939, and subsequent to October 24, 1940, the hours spent by plaintiffs' employees from the time they reported at or near the portal of the mines until they reached the portal at the end of the shift, including time on the surface in obtaining tools and materials and excepting any lunch period of 30 minutes or more, totaled in giving workweeks more than 44, 42 and 40 hours respectively. All this time was work time, and part of the workweek.

29.

Plaintiffs have failed to pay their employees at one and one-half their regular rate of pay for the hours in excess of 44, 42, and 40 hours weekly set out in finding 28.

The foregoing Findings of Fact are hereby made and entered this 10th day of September, 1941.

T. A. MURPHREE,
United States District Judge.

Filed Sept. 10th, 1941. T. A. Murphree, Dist. Judge.

541 CONCLUSIONS OF LAW.

(Civil Actions Nos. 5232, 5233, and 5234.)

1.

The actions by the plaintiffs are class actions in which the defendants fairly represent the class of underground ore mining employees of the plaintiffs. This is admitted by all parties.

2.

The underground ore mining employees of plaintiff have, since October 24, 1938, been engaged in the production of goods for commerce or in the processes or occupations necessary to such production within the meaning of the Fair Labor Standards Act of 1938, and have been and are entitled to its benefits:

3.

Within the meaning of Section 7 of the Fair Labor Standards Act of 1938, time worked includes all time spent by plaintiff's underground ore mine employees, including production and company or service men, from the time they report at or near the collar of the mine until they reach the collar at the end of the shift, and includes the aggregate of all time spent on the surface in obtaining and returning lamps, carbide, and tools, and in checking in and out. This time worked does not include any fixed lunch period, above or underground, of one-half hour or more and during which the miner is relieved of all duties.

4.

Plaintiff's said employees become subject to the discipline, control, and supervision of plaintiff at the time they report at or near the mouth of the mine and remain so subject, with the exception of any 30-minute lunch period during which they are relieved of all duties, until they leave the mouth of the mine at the end of the shift. During this entire time, with the exception noted, they are expending physical and mental energies in activities necessary to and in the interest of plaintiff's business; and employer-employee relationship within the meaning of the Act exists throughout, and they are employed and at work within the meaning of Section 7 of the Act.

5.

The phrase "usual working places" is a technical expression peculiar to the mining industry and has no reference to and does not determine the limits of the employer-employee relationship.

6.

The failure of plaintiff to compensate its employees for time worked within the meaning of the Act as set out above, cannot prevail to deny those employees compensation to which they are entitled under the Act.

7.

The employees of plaintiff have not waived their right to lawful compensation nor have they estopped themselves to claim the same.

8.

Plaintiff has violated Section 7 of the Act by failing to pay its employees for all time worked since October 24,

1938, in excess of the hours provided in Section 7 of the Act at time and one-half their regular rate of pay.

9.

Plaintiff is not entitled to a declaratory judgment that the working time which makes up the workweek of its underground ore mining employees within the meaning of Section 7 of the Fair Labor Standards Act of 1938 does not include that portion of the time spent by said employees in being transported or walking to and from the face of the seam.

10.

Plaintiff is not entitled to an injunction against Philip B. Fleming, Administrator of the Wage and Hour Division, United States Department of Labor, intervener, herein, or his agents and representatives from administering or enforcing Section 7 of said Act against plaintiff as interpreted by him in the administrative opinion, set out in Exhibit A to the complaint, to the effect that the time worked by plaintiff's said employees, within the meaning of Section 7, starts when they report for duty at or near the mouth of the mines, and ends when they reach the mouth at the end of the shift, and includes the aggregate of all time spent on the surface in obtaining and returning lamps, carbide and tools and in checking in and out, but does not include any fixed lunch period of one-half hour or more during which the miner is relieved of all duties.

11.

The foregoing conclusions of law entered on this 10th day of September, 1941.

T. A. MURPHREE,
United States District Judge.

Filed Sept. 10th, 1941. T. A. Murphree, Dist. Judge.

(Civil Actions Nos. 5232, 5233, and 5234.)

This cause coming on to be heard on the pleadings and proof, and the Court having heard and considered the evidence and arguments of counsel, and having made Findings of Fact and Conclusions of Law, which have been entered of record herein, it is, upon said pleadings and proof and upon said Findings of Fact and Conclusions of Law,

Ordered, Adjudged And Decreed, as follows:

1. This suit is entertained as a suit for a declaratory judgment, and it is considered and adjudged by the Court that the defendants and intervener, Philip B. Fleming, Administrator of the Wage and Hour Division, United States Department of Labor, are entitled to the relief hereby awarded.

2. The working time of the underground ore mining employees of plaintiff, within the meaning of Section 7 of the Fair Labor Standards Act of 1938, includes all time spent by plaintiff's said employees from the time they report at the collar or portal of the mine or mouth of the mine, until they emerge from the collar, portal, or mouth of the mine at the end of the shift, and includes the aggregate of all time spent by said employees on the surface in obtaining and returning lamps, carbide, and tools and in checking in and out. This time worked does not include any fixed lunch period of one-half hour or more during which said underground ore mining employee is relieved of all duties.

3. Plaintiff, in not compensating its said underground ore mining employees for all time worked as defined in paragraph 2 hereof in excess of 44 hours weekly between

October 24, 1938, and October 23, 1939; in excess of 42 hours weekly between October 24, 1939, and October 23, 1940; and in excess of 40 hours weekly since October 24, 1940 and until May 1, 1941, at a rate not less than one and one-half times the regular rate at which said employees were employed, has violated Section 7 of the Fair Labor Standards Act of 1938.

4. Plaintiff is not entitled to injunctive relief against any of the defendants and the intervener, Philip B. Fleming, Administrator of the Wage and Hour Division, United States Department of Labor, and plaintiff's prayers for such injunctive relief be, and the same hereby are, denied.

5. The temporary restraining order previously entered herein be, and the same hereby is, vacated and dissolved.

6. Such employees or their personal representatives as have not filed claims are given sixty days from the date hereof in which to file the same.

7. Jurisdiction of this cause is retained for the purpose of giving full effect to this decree and specifically to adjudge and determine the claims of the employees and their personal representatives for unpaid wages and liquidated damages and to adjudge and to appoint a special master or masters to report thereon and to determine and fix the fee for the attorneys for the defendants herein.

Ordered, Adjudged And Decreed this the 10th day of September, 1941.

T. A. MURPHREE,
United States District Judge.

Filed September 10th, 1941. T. A. Murphree, United States District Judge.

546 MOTION TO AMEND JUDGMENT.

(Civil Action No. 5232.)

Now comes plaintiff, Tennessee Coal, Iron and Railroad Company, a corporation, and, without waiving its motion for a judgment in its favor heretofore filed and overruled by the Court, but insisting thereon, and for the sole purpose of correcting said judgmeent so that it will conform to the opinion of the Court and will be pursuant to the matters submitted for judgment herein, moves the Court to amend the judgment heretofore rendered herein on September 10, 1941, in the following separate and several particulars:

1. By adding immediately after the words, "this cause coming on to be heard" where they appear in the first sentence thereof the following words: "was submitted for final judgment on the petition of the plaintiff for a declaratory judgment, and."

2. By striking therefrom paragraph numbered 3.

3. By striking therefrom paragraph numbered 6.

4. By amending paragraph numbered 7 so that the same shall read as follows:

The jurisdiction of this cause is retained for the purpose of giving full effect to this decree, and specifically to adjudge and determine the claims of the employees and their personal representatives for unpaid wages and liquidated damages, and to hear and determine plaintiff's defenses thereto, and to adjudge and to appoint a special master or masters to report thereon, and to determine and fix the fee for the attorneys for the defendants herein, and to enter such orders herein as to the Court may.

seem right and proper. If plaintiff promptly takes and prosecutes an appeal herefrom to the United States Circuit Court of Appeals for the Fifth Circuit proceedings under such retained jurisdiction shall be suspended pending such appeal.

Plaintiff submits herewith, and expressly makes a part hereof, the attached memorandum, assigning its separate and several causes in support of such amendment and its reasons therefor.

E. L. ALL,
BORDEN BURR,
Attorneys for Tennessee Coal, Iron and Railroad Company, Plaintiff.

Address: Brown-Marx Building,
Birmingham, Alabama.

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NOTICE OF HEARING ON MOTION OF PLTF., TENNESSEE COAL, IRON AND RAILROAD CO., TO AMEND JUDGMENT, omitted from the printed record, pursuant to Rule 23 of the Court.

* * * * * * *

Filed Sept. 19, 1941. Chas. B. Crow, Clerk, U. S. Dist. Court.

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On September 19, 1941, motions to amend judgment, identical with the foregoing were filed by Petitioner-

Plaintiff Sloss-Sheffield Steel & Iron Company in Civil Action No. 5233, and by Petitioner-Plaintiff Republic Steel Corporation in Civil Action No. 5234.

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## CAUSES FOR AND IN SUPPORT OF MOTION OF PETITIONER-PLAINTIFF TENNESSEE COAL, IRON & RAILROAD COMPANY TO AMEND JUDGMENT.

548 (Civil Action No. 5232.)

Comes the plaintiff in the above entitled cause, and for causes for and in support of its motion to amend the judgment rendered herein submits the following:

For the convenience of the Court plaintiff submits herewith a copy of the judgment as it will read if the motion is granted. The effect of all of the suggested changes is to have the judgment conform to the facts, to show that the case was heard only on the petition for a declaratory judgment, to eliminate from the judgment adjudication in reference to issues which were not before the Court, and to conform the judgment to an adjudication on the petition for a declaratory judgment, which we respectfully submit was the only matter before the Court during the trial which began on July 8, 1941 and concluded on August 1, 1941.

We submit that the motion should be granted, that paragraphs numbered 3 and 6 of the judgment as written should be stricken, and the first sentence of the judgment and paragraph numbered 7 thereof should be amended as suggested because such separate and several paragraphs:

(a) Adjudicate matters which had not been tried or heard by the Court;

(b) Adjudicate matters in reference to which plaintiffs have never had their day in Court;

(c) Adjudicate matters concerning which the plaintiff has never had an opportunity to present its contentions as to the law, and has never been heard on these contentions;

(d) Adjudicate matters without disposing of pleadings on file in reference to such matters;

(e) Adjudicate matters as to which the plaintiff has never been given an opportunity to plead;

(f) Adjudicate matters as to which the plaintiff has never been given an opportunity to present evidence;

(g) Adjudicate matters as to which the plaintiff has never been given an opportunity to be heard on;

(h) Adjudicate matters which have never been set down for trial by the Court;

(i) Adjudicate matters which the record in this case shows have never been set down for hearing or determination;

(j) Deprive the plaintiff of its day in Court;

(k) Deprive the plaintiff of the opportunity to present pleadings, and, in the event their defenses are held good as a matter of law, to offer evidence in relation to any defenses which they wish in good faith to interpose to the claims of defendants, even though the Court is correct in its judicial construction of Section 7 of the Act.

(l) Adjudicate matters contrary to the following separate and several orders, agreements, and occurrences:

1. The statement of the Court made at the time of the hearing of defendant's motion to dismiss the case, such statement being in substance that the sole question to be determined on the setting of the case for June 23, 1941 (thereafter by agreement continued until July 8, 1941) was that portion of the case relating to a judicial declaration as to the meaning of the word "workweek" as used in Section 7 of the Fair Labor Standards Act of 1938 in relation to the underground ore mining employees of the plaintiff.

2. The pre-trial agreement executed by attorneys for plaintiffs and for the original defendants.

3. The pre-trial order made by the Court on May 22, 1941.

4. The decree of the Court filed on May 26, 1941, overruling, among other things, defendants' motion to dismiss, and ordered the case set down for trial in accordance with the pre-trial order.

5. The order of the Court made on the 7th day of June, 1941, in which, among other things, the motion of Fleming to intervene as a party defendant was granted with a provision that the pre-trial agreement and the pre-trial order and all orders previously made in the case should be in all respects binding upon the intervener as a condition to the intervention.

6. The statements made by the Court as to the issue on trial at the time of the beginning of the trial on July 8, 1941, and during subsequent proceedings while the trial was pending.

7. The fact that the introduction of evidence in the case on the part of the plaintiffs indicated full reliance by plaintiff upon previous rulings of the Court that matters relating to estoppel, waiver, payment, method of computation, and other defenses were not on trial.

8. The fact that the introduction of evidence in the case on the part of the plaintiffs indicated full reliance upon previous rulings of the Court that the only issue on trial and under consideration was the judicial construction of Section 7 of the Fair Labor Standards Act of 1938 as applicable to plaintiff's underground employees.

9. The fact that in the opinion rendered by the Court on August 13, 1941, the only matters discussed or referred to related to the only question submitted to the Court, namely, the judicial construction of Section 7 of the Act, and that the only reference in such opinion to any other matters was in the following words:

"Since we have concluded that the defendants are correct in their general position, these counterclaims shall be set down for a separate trial and judgment at a convenient date. See Rule 42(b), Federal Rules of Civil Procedure."

10. The fact that on August 13, 1941, the Court in notifying the attorneys in the case of his opinion wrote and had delivered to said attorneys named in said letter a letter in words and figures as follows:

"United States District Judge's Chambers, Northern District of Alabama, Birmingham, Alabama.

Thomas A. Murphree,
District Judge.

August 13, 1941.

Re: Tennessee Coal, Iron & Railroad Company, a corporation, Sloss-Sheffield Steel and Iron Company a corporation, and Republic Steel corporation, a corporation, vs. Certain Labor Unions, etc. Civil Actions 5232, 5233, and 5234.

Gentlemen:

Enclosed you will find a copy of my opinion in the above actions I believe that it supplies all the necessary

information for the formal findings of fact, conclusions of law and for the declaratory judgments that must be entered in these actions.

I request the attorneys for the defendants and for the intervener to confer and prepare written findings of fact, conclusions of law and declaratory judgments, in conformity with the enclosed opinion.

I will be unavailable from the present date until September 8, 1941; therefore, these papers may be presented to me on or after September 8, 1941.

Cordially yours,
(S.) T. A. MURPHREE,
United States District Judge.

TAM:f.

To: Messrs. Benners, Burr, McKamy and Forman, Messrs. Bradley, Baldwin, All and White, Crampton Harris, Equire, Lee Pressman, Esquire, Jerome A. Cooper, Esquire, Abner Brodie, Esquire, J. Q. Smith, Esquire, Ralph Quinn, Esquire, W. F. Spencer, Esquire, J. M. Limpsomb, Esquire."

11. The fact that on August 14, 1941, the Court stated to counsel for plaintiff, namelly, E. L. All and Borden Burr, substantially that it was his intention, following his understanding of what had occurred, that the judgment when rendered in accordance with his opinion would be so written as to insure plaintiff's right of appeal from the declaratory judgment in advance of any considerations of questions raised by defendants' counterclaims.

E. L. ALL,
BORDEN BURR,
Attorneys for Tenn. Coal, Iron & RRCo., Plaintiff.

Address: Brown-Marx Building,
Birmingham, Alabama.

I hereby certify that a copy of the foregoing has been served upon Crampton Harris, J. Q. Smith, and Jerome A. Cooper, Attorneys for the respective defendants, on this the 20 day of Sept. 1941.

BORDEN BURR,
Attorney for Plaintiff.

Birmingham, Alabama.
Filed September 19, 1941.

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553 JUDGMENT.

In the District Court of the United States for the Northern District of Alabama, Southern Division.

Tennessee Coal, Iron & Railroad Company, A Corporation, Petitioner and Plaintiff,
vs.
Muscoda Local No. 123, et al, Defendants,

Philip B. Fleming, Administrator, etc., Intervener.

Civil Action File No. 5232.

This cause coming on to be heard was submitted for final judgment on the petition of the plaintiff for a declaratory judgment, and on the pleadings and proof, and the Court having heard and considered the evidence and arguments of counsel, and having made findings of fact and conclusions of law, which have been entered of record herein, it is, upon said pleadings and proof and upon said findings of fact and conclusions of law,

Ordered, Adjudged, And Decreed, As follows:

1. This suit is entertained as a suit for a declaratory judgment, and it is considered and adjudged by the Court

that the defendants and intervener, Philip B. Fleming, Administrator of the Wage and Hour Division, United States Department of Labor, are entitled to the relief hereby awarded.

2. The working time of the underground ore mining employees of plaintiff, within the meaning of Section 7 of the Fair Labor Standards Act of 1938, includes all time spent by plaintiff's said employees from the time they report at the collar or portal of the mine or mouth of the mine, until they emerge from the collar, portal, or mouth of the mine at the end of the shift, and includees the aggregate of all time spent by said employees on the surface in obtaining and returning lamps, carbide, and tools and in checking in and out. This time worked does not include any fixed lunch period of one-half hour or more during which said underground ore mining employee is relieved of all duties.

3. Plaintiff is not entitled to injunctive relief against any of the defendants and the intervener, Philip B. Fleming, Administrator of the Wage and Hour Division, United States Department of Labor, and plaintiff's prayers for such injunctive relief be, and the same hereby are, denied.

4. The temporary restraining order previously entered herein be, and the same hereby is, vacated and dissolved.

5. The jurisdiction of this cause is retained for the purpose of giving full effect to this degree, and specifically to adjudge and determine the claims of the employees and their personal representatives for unpaid wages and liquidated damages, and to hear and determine plaintiff's defenses thereto, and to adjudge and to appoint a special master or masters to report thereon, and to determine and fix the fee for the attorneys for the defendants herein, and to enter such orders herein as to the Court may seem

right and proper. If plaintiff promptly takes and prosecutes an appeal herefrom to the United States Circuit Court of Appeals for the Fifth Circuit, proceedings under such retained jurisdiction shall be suspended pending such appeal.

Ordered, Adjudged, And Decreed This the 10th day of September, 1941.

.....

United States District Judge.

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On September 19, 1941, Causes for and in Support of Motion to Amend Judgment, identical with the foregoing, were filed by Petitioner-Plaintiff Sloss-Sheffield Steel & Iron Company in Civil Action No. 5233, and by Petitioner-Plaintiff Republic Corporation in Civil Action No. 5234.

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## PLAINTIFF'S OBJECTIONS TO FINDINGS OF FACT AND MOTION FOR AMENDMENT THEREOF.

556 Civil Action File No. 5232.

Comes Tennessee Coal, Iron and Railroad Company, a corporation, plaintiff, and objects to the findings of fact filed herein on September 10, 1941, as a whole, and, separately and severally, to each separate and several numbered finding, and for grounds of said objection assigns the following, separately and severally:

1. The findings of fact are contrary to the evidence.

2. The findings of fact are against the overwhelming weight of the evidence.

3. The findings of fact are not substantially supported by the evidence.

4. The findings of fact are not sufficient to support the judgment rendered thereon.

5. The findings of fact are not sufficient to support the judgment rendered thereon in that the trial of said cause was begun on July 8, 1941, and was concluded on August 1, 1941; the stenographic transcript of the oral evidence contained 2600 pages; there was offered in evidence approximately 244 exhibits, consisting of maps, printed documents, typewritten matter, etc., aggregating thousands of pages, and such findings of fact consist of only nine typewritten pages, and fail to include any findings on many matters bearing on vital issues of the case, and find as to other matters only facts relating to fragmentary portions of the evidence.

6. The findings of fact are not sufficient to support the judgment rendered thereon in that the trial of said cause was begun on July 8, 1941, and was concluded on August 1, 1941; the stenographic transcript of the oral evidence contained 2600 pages; there was offered in evidence approximately 244 exhibits, consisting of maps, printed documents, typewritten matter, etc., aggregating thousands of pages, and such findings of fact consist of only nine typewritten pages, and fail to include any findings on many matters bearing on vital issues of the case, and find as to other matters only facts relating to fragmentary portions of the evidence, and make findings which support only the contentions of the defendants and the defendant-intervener, and makes no findings as to facts proven either by the undisputed evidence or its great preponderance which support the contentions of plaintiff.

7. Such findings of fact fail altogether to make any finding as to the operations of this plaintiff at its separate ore mines.

8. Such findings relate to all the separate underground ore mines of this plaintiff, and as to some of such mines are unsupported by the evidence.

9. Such findings of fact are insufficient in that they relate to and cover the period of time between October 24, 1938, and May 1, 1941, and do not make any sufficient finding as to the relevant and vital facts relating to the period prior to October 24, 1938, a large portion, if not the greater portion, of the evidence introduced relating to such prior period of time, and being relevant to the issue.

10. Such findings of fact are too uncertain and indefinite to support the decree or judgment rendered on September 10, 1941, in that it does not sufficiently appear therefrom as to what period of time the findings relate to.

11. The findings of fact relate to all plaintiff's underground ore mining employees in all plaintiff's underground ore mines and such findings of fact are not applicable under the pleadings and proof to the underground ore mining employees at plaintiff's number 5 limestone mine at Muscoda.

12. The findings of fact relate to all plaintiff's underground ore mining employees in all plaintiff's underground ore mines and such findings of fact are not applicable under the pleadings and proof to the underground ore mining employees at plaintiff's number 6 mine at Muscoda.

13. The findings of fact relate to all plaintiff's underground ore mining employees in all plaintiff's underground ore mines and such findings of fact are not applicable un-

der the pleadings and proof to the underground ore mining employees at plaintiff's number 7 mine at Wenonah.

14. The findings of fact relate to all plaintiff's underground ore mining employees in all plaintiff's underground ore mines and such findings of fact are not applicable under the pleadings and proof to the underground ore mining employees at plaintiff's number 8 mine at Wenonah.

15. The findings of fact relate to all plaintiff's underground ore mining employees in all plaintiff's underground ore mines and such findings of fact are not applicable under the pleadings and proof to the underground ore mining employees at plaintiff's number 9 mine at Wenonah.

16. The findings of fact relate to all plaintiff's underground ore mining employees in all plaintiff's underground ore mines and such findings of fact are not applicable under the pleadings and proof to the underground ore mining employees at plaintiff's number 10 mine at Wenonah.

17. The findings of fact relate to all plaintiff's underground ore mining employees in all plaintiff's underground ore mines and such findings of fact are not applicable under the pleadings and proof to the underground ore mining employees at plaintiff's number 11 mine at Ishkooda.

18. The findings of fact relate to all plaintiff's underground ore mining employees in all plaintiff's underground ore mines and such findings of fact are not applicable under the pleadings and proof to the underground ore mining employees at plaintiff's number 13 mine at Ishkooda.

19. The "usual working places" of the productive employees are at the face of the seam, and include that area

of the mine in close proximity to the fact of the seam in which they are required to perform work in connection with or incidental to mining the ore from the face of the seam.

20. The "usual working places" or underground stations of the company or service men are at such various places throughout the mine as they have been directed to work by their immediate supervisors.

21. During the approximately 60-year history of iron ore mining in the Birmingham, Alabama District, Tennessee Coal, Iron and Railroad Company's (or its predecessors') production employees employed as underground ore miners have never been paid or received compensation for time spent by them in being transported or in walking to and from their usual working place.

22. During the approximately 60-year history of iron ore mining in the Birmingham, Alabama District, Republic Steel Corporation's (or its predecessors') production employees employed as underground ore miners have never been paid or received compensation for time spent by them in being transported or in walking to and from their usual working places.

23. During the approximately 60-year history of iron ore mining in the Birmingham, Alabama, District, Sloss-Sheffield Steel & Iron Company's (or its predecessors') production employees employed as underground ore miners have never been paid or received compensation for time spent by them in being transported or in walking to and from their usual working place.

24. During the approximately 60-year history of iron ore mining in the Birmingham, Alabama, District, Woodward Iron Company's (or its predecessors') production

employees employed as underground ore miners have never been paid or received compensation for time spent by them in being transported or in walking to and from their usual working place.

25. During the approximately 60-year history of iron ore mining in the Birmingham, Alabama District, Tennessee Coal, Iron and Railroad Company's (or its predecessors') production employees employed as red ore miners have never been paid or received compensation for the time spent by them in traveling from the entrance or mouth of the mine to the underground loading station and from the underground loading station to the entrance of the mine.

26. During the approximately 60-year history of iron ore mining in the Birmingham, Alabama District, Republic Steel Corporation's (or its predecessors') production employees employed as red ore miners have never been paid or received compensation for the time spent by them in traveling from the entrance or mouth of the mine to the underground loading station and from the underground loading station to the entrance or mouth of the mine.

27. During the approximately 60-year history of iron ore mining in the Birmingham, Alabama District, Sloss-Sheffield Steel & Iron Company's (or its predessors') production employees employed as red ore miners have never been paid or received compensation for the time spent by them in traveling from the entrance or mouth of the mine to the underground loading station and from the underground loading station to the entrance or mouth of the mine.

28. During the approximately 60-year history of iron ore mining in the Birmingham, Alabama District, Wood-

ward Iron Company's (or its predecessors') production employees employed as red ore miners have never been paid or received compensation for the time spent by them in traveling from the entrance or mouth of the mine to the underground loading station and from the underground loading station to the entrance or mouth of the mine.

29. During the approximately 60-year history of iron ore mining in the Birmingham, Alabama District, Tennessee Coal, Iron & Railroad Company's (or its predecessors') production employees employed as red ore miners have never been paid or received compensation for the time consumed by such employees in walking between the underground manloading station and the face of the seam and return.

30. During the approximately 60-year history of iron ore mining in the Birmingham, Alabama District, Republic Steel Corporation's (or its predecessors') production employees employed as red ore miners have never been paid or received compensation for the time consumed by such employees in walking between the underground manloading station and the face of the seam and return.

31. During the approximately 60-year history of iron ore mining in the Birmingham, Alabama District, Sloss-Sheffield Steel & Iron Company's (or its predecessors') production employees employed as red ore miners have never been paid or received compensation for the time consumed by such employees in walking between the underground manloading station and the face of the seam and return.

32. During the approximately 60-year history of iron ore mining in the Birmingham, Alabama District, Woodward Iron Company's (or its predecessors') production

employees employed as red ore miners have never been paid or received compensation for the time consumed by such employees in walking between the underground man-loading station and the face of the seam and return.

33. During the approximately 60-year history of iron ore mining in the Birmingham, Alabama District, Tennessee Coal, Iron and Railroad Company's (or its predecessors') company or service underground iron ore mining employees have never been paid or received compensation for time spent by them in being transported or in walking to and from their usual working place.

34. During the approximately 60-year history of iron ore mining in the Birmingham, Alabama District, Republic Steel Corporations' (or its predecessors') company or service underground iron ore mining employees have never been paid or received compensation for time spent by them in being transported or in walking to and from their usual working place.

35. During the approximately 60-year history of iron ore mining in the Birmingham, Alabama District, Sloss-Sheffield Steel & Iron Company's (or its predecessors') company or service underground iron ore mining employees have never been paid or received compensation for the time spent by them in being transported or in walking to and from their usual working place.

36. During the approximately 60-year history of iron ore mining in the Birmingham, Alabama District, Woodward Iron Company's (or its predecessors') company or service underground iron ore mining employees have never been paid or received compensation for time spent by them in being transported or in walking to and from their usual working place.

37. During the approximately 60-year history of iron ore mining in the Birmingham, Alabama District, Tennessee Coal, Iron and Railroad Company's (or its predecessors') company or service underground iron ore mining employees have never been paid or received compensation for the time spent by them in traveling from the entrance or mouth of the mine to the underground loading station and from the underground loading station to the entrance or mouth of the mine.

38. During the approximately 60-year history of iron ore mining in Birmingham, Alabama District, Republic Steel Corporation's (or its predecessors') company or service underground iron ore mining employees have never been paid or received compensation for the time spent by them in traveling from the entrance or mouth of the mine to the underground loading station and from the underground loading station to the entrance or mouth of the mine.

39. During the approximately 60-year history of iron ore mining in the Birmingham, Alabama District, Sloss-Sheffield Steel & Iron Company's (or its predecessors') company or service underground iron ore mining employees have never been paid or received compensation for the time spent by them in traveling from the entrance or mouth of the mine to the underground loading station and from the underground loading station to the entrance or mouth of the mine.

40. During the approximately 60-year history of iron ore mining in the Birmingham, Alabama District, Woodward Iron Company's (or its predecessors') company or service underground iron ore mining employees have never been paid or received compensation for the time spent by them in traveling from the entrance or mouth

of the mine to the underground loading station and from the underground loading station to the entrance or mouth of the mine.

41. Company or service men have never been paid for any of the time actually spent in traveling to and from their underground stations.

42. It has always been the custom under which plaintiff paid its underground red ore mining employees not to pay them for any of the time spent in traveling to and from their particular stations.

43. Prior to the enactment of the Fair Labor Standards Act of 1938, plaintiff's underground iron ore mining employees never made any effort to obtain compensation for all of the time spent by them daily after reporting at the mouth of the mine until they left the mouth of the mine at the end of the workday.

44. Prior to the enactment of the Fair Labor Standards Act of 1938, plaintiff's underground iron ore mining employees never made any effort to obtain compensation for all of the time spent by them daily after reporting at the mouth of the mine until they left the mouth of the mine at the end of the workday, and during such time said employees made no effort to obtain compensation for all of such time and only made an effort to obtain compensation for a part of such time, and after the 13th day of June, 1935, never made any effort to obtain compensation for any of such time.

45. Prior to the enactment of the Fair Labor Standards Act of 1938, plaintiff's underground iron ore mining employees never made any effort to obtain compensation for all of the traveling time spent by them daily after re-

porting at the mouth of the mine until they left the mouth of the mine at the end of the workday, knew that they were not receiving compensation for such time, and during such time and with such knowledge signed either twice a month or four times a month written receipts (which did not include compensation for such traveling time) acknowledging payment in full for all compensation due to them from the plaintiff.

46. Finding of fact numbered 14 is at variance with and contrary, if not to the undisputed evidence, to the overwhelming weight of the evidence.

47. Prior to October 24, 1938, Tennessee Coal, Iron and Railroad Company's employees employed as red ore miners made to the management the following proposals or propositions for a written contract in reference to wages, hours, and conditions of employment, and relating to the question of receiving compensation for traveling time expended daily by them after reporting at the mouth of the mine until they left the mouth of the mine at the end of the workday, to which the management made the following replies:

(a) On October 19, 1933, a committee of seven men representing the ore mining employees of the Company who were members or were connected with the defendant locals affiliated with the International Union of Mine, Mill and Smelter Workers presented to the Company for its consideration six suggestions in reference to conditions of employment, three of these suggestions being as follows:

"4—Suggestion that men enter the mines on their own time and come out on Company time:

"5—Suggestion for an 8-hour day and 40-hour week and

"6—Suggestion that rates of pay be increased accordingly."

The Company made to these suggestions the following reply:

"These three suggestions are considered as one since they can be answered as such. The code adopted for moal mining is being followed very closely by this Company in connection with its ore mining operations and that code provides for 8 hours of work at the usual working place, exclusive of the lunch period, for a 40-hour week and for certain wage scales. While we do not propose the adoption of identical wage scales at the ore mines as those of coal mines, proper differentials are being maintained and adjustments have been made to insure a fair wage to each employee."

Tennessee Coal, Iron and Railroad Company's Exhibit No. 5 sets out in full the proposals made at this time and the Company's reply thereto.

(b) On April 13, 1934, officers and representatives of the defendant locals affiliated with the International Union of Mine, Mill and Smelter Workers presented and submitted to the Company, in representation of and in behalf of the iron ore employees of the Company who were connected with or members of the International Union of Mine, Mill and Smelter Workers, a written demand "in working agreements and wage scales" containing 22 separate demands. The eighth written demand thereof read as follows:

"8. In view of the fact that the Company can force the men to enter and leave the mines at any time stated by the Company, we ask the right to enter on our own time and leave on the Company's time."

In reference to this demand, the Company replied as follows:

"Item 8: When we changed the working time in the mines from ten hours to eight, we found that the average time spent at the face was about nine hours. We then adjusted the wage to equal nine hours pay for eight hours at the face or regular working place, so that we feel we have done all that you now request. There must be a regular starting time and quitting time for the orderly operation of the mine and we are convinced that our present policy is fair and proper."

Tennessee Coal, Iron and Railroad Company's Exhibits No. 6 and No. 7 set out in full the proposals made at this time, and the Company's replies thereto.

(c) On June 13, 1935, a committee consisting of the presidents and other officers of the three defendant locals affiliated with the International Union of Mine, Mill and Smelter Workers' presented in writing to the Company a copy of a proposed written contract containing 17 paragraphs. The ninth paragraph thereof read as follows:

"9. It is agreed that the employees shall enter the mine on their own time and come out on the Company's time."

The company replied in writing on June 24, 1935, declining to execute the contract.

Tennessee Coal, Iron and Railroad Company's Exhibits No. 9, 9(a), and 9(b) set out in full the proposals made at this time and the Company's replies thereto.

(d) On May 26, 1936, A. E. Horn, President, District No. 5, International Union of Mine, Mill and Smelter Workers, acting in behalf of the iron ore employees of the Company who were connected with or members of

the International Union of Mine, Mill and Smelter Workers, presented and submitted to the Company a proposed written contract, consisting of 6 pages and entitled "Working Agreement in Reference to Wages, Hours of Service, and Conditions of Employment", and among such provisions was the following:

"The eight-hour day means eight hours in or about the mines at the usual working places for all classes of work —exclusive of the lunch period, whether they be paid by the day or paid by tonnage."

This proposed contract made no demand or suggestion that the underground mining employees of the plaintiff should receive compensation for any part of the traveling time expended daily by them after reporting at the mouth of the mine until they left the mouth of the mine at the end of the workday. On the contrary, it suggested to the Company that the men were to receive their compensation on the basis of an eight-hour day, meaning "eight hours in or about the mines at the usual working places."

Tennessee Coal, Iron and Railroad Company's Exhibits No. 10 and 10(a) set out in full the proposals for contract and a copy of the proposed contract.

The efforts set out and described above are the only efforts ever made by said employees relating to the question of receiving compensation for any part of the time expended daily by them in traveling after reporting at the mouth of the mine until they left the mouth of the mine at the end of the workday.

48. Prior to October 24, 1938, Republic Steel Corporation's employees employed as red ore miners made to the

management the following proposals or propositions for written contracts in reference to wages, hours, and conditions of employment, and relating to the question of receiving compensation for traveling time expended daily by them after reporting at the mouth of the mine until they left the mouth of the mine at the end of the workday, to which the management made the following replies:

(a) On September 30, 1933, International Union of Mine, Mill and Smelter Workers, Raimund Local No. 121, handed to Mr. N. E. Thompson, Superintendent of the Raimund Ore Mine of Republic Steel Corporation, a letter in which there was incorporated thirteen separate demands. Demand No. 6 was as follows:

"The men enter the mine on their own time and come out of the mine on the Company time."

This demand No. 6 was not mentioned or brought up at the meeting between the Union and the Company which subsequently considered these thirteen demands.

Republic Steel Corporation's Exhibit No. 3 sets out these demands in full.

(b) On March 13, 1934, a committee of men, purporting to be the chosen representatives of more than 90% of the Republic Steel Corporation's employees at their Raimund mines, and members of Raimund Red Ore Local No. 121, International Union of Mine, Mill and Smelter Workers, presented and submitted in writing to the Republic Steel Corporation a proposal containing 22 separate demands (these demands are set forth fully in Republic Steel Corporation's Exhibit No. 4). Among these demands, No. 10 reads as follows:

"That the men not be required to enter and leave their place of work on their own time."

In subsequent discussions with the Company's representatives demand No. 10 was not discussed, and the work time remained on a "face to face" basis, which did not include any compensation for traveling time.

(c) On or about June 18, 1935, representatives of Raimund Local No. 121 of the International Union of Mine, Mill and Smelter Workers presented and submitted for consideration a proposed agreement (Republic Steel Corporation's Exhibit No. 6 sets out in full the proposal. Provision No. 9 reads as follows:

"It is agreed that the employee shall enter the mines on their own time and come out of the mine on the Company's time."

The Company in reference to this proposal replied as follows:

"* * * these requests or demands, as set out, are denied."

The Company's reply is set out in full in Republic Steel Corporation's Exhibit No. 8.

(d) On May 26, 1936, A. E. Horn, President, District No. 5, International Union of Mine, Mill and Smelter Workers, presented and submitted to the Company a proposed written contract, consisting of 6 pages and entitled "Working Agreement in Reference to Wages, Hours of Service, and Conditions of Employment", and among such provisions was the following:

"The eight-hour day means eight hours in or about the mines at the usual working places for all classes of work—exclusive of the lunch period, whether they be paid by the day or be paid by tonnage."

This proposed contract made no demand or suggestion that the underground mining employees of the plaintiff should receive compensation for any part of the traveling time expended daily by them after reporting at the mouth of the mine until they left the mouth of the mine at the end of the workday. On the contrary, it suggested to the Company that the men were to receive their compensation on the basis of an eight-hour day, meaning "eight hours in or about the mines at the usual working places."

Republic Steel Corporation's Exhibit No. 7 sets out in full the proposals for contract and a copy of the proposed contract.

The efforts set out and described above are the only efforts ever made by said employees relating to the question of receiving compensation for any part of the time expended daily by them in traveling after reporting at the mouth of the mine until they left the mouth of the mine at the end of the workday.

49. Prior to October 24, 1938, Sloss-Sheffield Steel & Iron Company's employees employed as red ore miners made to the management the following proposals or propositions for written contracts in reference to wages, hours, and conditions of employment, and relating to the question of receiving compensation for traveling time expended daily by them after reporting at the mouth of the mine until they left the mouth of the mine at the end of the workday, to which the management made the following replies:

(a) On April 13, 1934, officers and representatives of the defendant locals affiliated with the International Union of Mine, Mill and Smelter Workers presented and submitted to the Company, in representation of and in behalf of the iron ore employees of the Company who were connected with or members of the International Union of Mine, Mill and Smelter Workers, a written demand "in working agreements and wage scales" containing 22 separate demands. The eighth written demand thereof read as follows:

"8. In view of the fact that the Company can force the men to enter and leave the mines at any time stated by the Company, we ask the right to enter on our own time and leave on the Company's time."

The Company declined to execute or make the contract as thus proposed, and no insistence was made for this demand.

Sloss-Sheffield Steel & Iron Company's Exhibit No. 1 sets out in full the proposals made at this time.

(b) In June 1935 representatives of the Sloss Red Ore Local No. 109, International Union of Mine, Mill and Smelter Workers, on behalf of the iron ore employees of the Company who were connected with or members of defendant Local No. 109, presented and submitted to the Company for consideration a proposed agreement. Proposal No. 11 reads as follows:

"It is agreed that the employees shall enter the mines on their own time and come out of the mines on the Company's time."

The Company declined to execute or make the contract as thus proposed.

Sloss-Sheffield Steel & Iron Company's Exhibit No. 3 sets out the proposals in full.

(c) On May 26, 1936, A. E. Horn, President, District No. 5, International Union of Mine, Mill and Smelter Workers, acting in behalf of the iron ore employees of the Company who were connected with or members of the International Union of Mine, Mill and Smelter Workers, presented and submitted to the Company a proposed written contract, consisting of 6 pages and entitled "Working Agreement in Reference to Wages, Hours of Service, and Conditions of Employment", and among such provisions was the following:

"The eight-hour day means eight hours in or about the mines at the usual working places for all classes of work —exclusive of the lunch period, whether they be paid by the day or paid by tonnage."

This proposed contract made no demand or suggestion that the underground mining employees of the plaintiff should receive compensation for any part of the traveling time expenses daily by them after reporting at the mouth of the mine until they left the mouth of the mine at the end of the workday.

Sloss-Sheffield Steel & Iron Company's Exhibit No. 7 sets out in full the proposals for contract and a copy of the proposed contract.

(d) In August, 1938, the mine committee of the Sloss ore mine, composed of John Hill, W. A. O'Neil, Jessie Gaines, as local representatives of Local No. 109 presented

and submitted to the Company for consideration 31 demands.

None of the written demands asked for compensation for travel time expended daily by the Company's underground ore mining employees after reporting at the mouth of the mine until they left the mouth of the mine at the end of the workday, nor was any suggestion or demand made in the subsequent meeting between the employees' representatives and the Company.

The demands are set out in full in Sloss-Sheffield Steel & Iron Company's Exhibit No. 12.

The efforts set out and described above are the only efforts ever made by said employees prior to Oct. 24, 1938, relating to the question of receiving compensation for any part of the time expended daily by them in traveling after reporting at the mouth of the mine until they left the mouth of the mine at the end of the workday.

50. Prior to October 24, 1938, Woodward Iron Company's employees employed as red ore miners made to the management the following proposals or propositions for written contracts in reference to wages, hours, and conditions of employment, and relating to the question of receiving compensation for traveling time expended daily by them after reporting at the mouth of the mine until they left the mouth of the mine at the end of the workday, to which the management made the following replies:

(a) On April 13, 1934, officers and representatives of Lipscomb Red Ore Local No. 103, affiliated with the International Union of Mine, Mill and Smelter Workers, on behalf of its iron ore members who were employees of the Woodward Iron Company, presented and submit-

ted to the Company a written demand containing 22 separate demands, the eighth demand thereof reading as follows:

"8. In view of the fact that the Company can force the men to enter and leave the mines at any time stated by the Company, we ask the right to enter on our own time and leave on the Company's time."

The Woodward Company refused to comply with the demand.

The demands are set out in full in Sloss-Sheffield Steel & Iron Company's Exhibit No. 25.

(b) In June, 1936, the General Committee of Local 103, International Union of Mine, Mill and Smelter Workers, presented and submitted to Woodward Iron Company a proposed working agreement between that Company and their employees, members of the International Union of Mine, Mill and Smelter Workers. Among the proposals was the following:

"The eight-hour day means eight hours in or about the mines at the usual working places for all classes of labor —exclusive of the lunch period, whether they be paid by the day or paid by tonnage."

This proposed contract made no demand or suggestion that the underground mining employees of the Company should receive compensation for any part of the traveling time expended daily by them after reporting at the mouth of the mine until they left the mouth of the mine at the end of the workday.

Sloss-Sheffield Exhibit No. 27 sets out in full the proposed agreement referred to.

(c) On May 31, 1937, representatives for Lipscomb Red Ore Local 103, affiliated with the International Union of Mine, Mill and Smelter Workers, presented and submitted to Woodward Iron Company a proposed agreement which contained no suggestion or demand that the underground ore mining employees of that Company should receive compensation for any part of their travel time expended daily by them after reporting at the mouth of the mine until they left the mouth of the mine at the end of the workday.

Sloss-Sheffield Exhibit No. 29 sets out in full the proposed agreement referred to.

(d) In September, 1938, the Red Ore Committee of the International Union of Mine, Mill and Smelter Workers, presented and submitted to the Woodward Iron Company for consideration a proposed contract. This proposed contract made no demand or suggestion as to payment for travel time.

Sloss-Sheffield Exhibit No. 31 sets out in full the proposed agreement referred to.

The efforts set out and described above are the only efforts ever made by said employees prior to October 24, 1938, relating to the question of receiving compensation for any part of the time expended daily by them in traveling after reporting at the mouth of the mine until they left the mouth of the mine at the end of the workday.

51. Subsequent to October 24, 1938, Sloss-Sheffield Steel & Iron Company's employees employed as red ore miners made to the management the following proposals for written contracts in reference to wages, hours, and

conditions of employment, and relating to the question of receiving compensation for traveling time expended daily by them after reporting at the mouth of the mine until they left the mouth of the mine at the end of the work-day:

(a) In August 1939 a proposed agreement was submitted to the Company by representatives of the Sloss Red Ore Local 109, affiliated with the International Union or Mine, Mill and Smelter Workers. The proposed agreement contained no reference to payment of travel time. This agreement is set out in full in Sloss-Sheffield Steel & Iron Company's Exhibit No. 14.

(b) On August 30, 1940, there was presented to the Company by representatives of the Sloss Red Ore Local No. 109 of the International Union of Mine, Mill and Smelter Workers a proposed agreement. This proposed agreement contained, among other things, the following:

"Provided, further, that a day's work shall mean eight hours, including the time entering and leaving the mine, and exclusive of lunch period."

This proposed agreement is contained in Sloss-Sheffield Steel & Iron Company's Exhibit No. 16.

The Company declined to execute this agreement as proposed.

The above constitute all of such proposals presented to Sloss Co. subsequent to Oct. 24, 1938.

52. Subsequent to October 24, 1938, Woodward Iron Company's employees employed as red ore miners made to the management the following proposals for written

contracts in reference to wages, hours, and conditions of employment, and relating to the question of receiving compensation for traveling time expended daily by them after reporting at the mouth of the mine until they left the mouth of the mine at the end of the workday:

(a) On March 10, 1939, Lipscomb Red Ore Local No. 103, affiliated with International Union of Mine, Mill and Smelter Workers, presented to Woodward Iron Company proposed agreement in which, among other things, there was contained the following clause:

"Eight hours a day shall mean eight hours of work in or about the mines at the usual working places for all classes of labor, exclusive of the lunch period, whether they be paid by the day or be paid on a tonnage basis."

This proposed agreement contained no demand that the employee be paid for travel time.

Sloss-Sheffield Steel & Iron Company's Exhibit No. 32 sets out in full the proposed agreement.

(b) On September 1, 1939, Lipscomb Red Ore Local No. 103, affiliated with the International Union of Mine, Mill and Smelter Workers, presented to Woodward Iron Company a proposed agreement in which, among other things, there was contained the following clause:

"Eight hours a day shall mean eight hours of work in or about the mines at the usual working places for all classes of labor, exclusive of the lunch period, whether they be paid by the day or be paid on a tonnage basis."

There is no provision contained in this proposal that employees be compensated for any portion of their travel time.

Sloss-Sheffield Steel & Iron Company's Exhibit No. 33 sets out in full the provisions of this proposal.

(c) On November 6, 1940, Lipscomb Red Ore Local No. 103, affiliated with the International Union of Mine, Mill and Smelter Workers, presented to Woodward Iron Company a proposed agreement. There was contained in this proposal the following provision:

"Provided time worked shall be computed from collar to collar. That is to say, the employees shall be paid for all time in each day they are required to be on the premises of the Company, except, of course, lunch period when so provided."

The Company declined to execute this agreement as proposed.

Sloss-Sheffield Steel & Iron Company's Exhibit No. 35 sets out in full the proposals contained in this proposed agreement.

The above constitute all of such proposals presented to Woodward Company subsequent to Oct. 24, 1938.

53. Tennessee Coal, Iron and Railroad Company, prior to the commencement of the trial of this case, entered into the following described written contracts with certain of its iron ore mining employees represented by the following described representatives and containing, among other things, the following described agreements:

(a) On October 6, 1938, a contract was entered into between the Company and the International Union of Mine, Mill and Smelter Workers on behalf of its members employed by the Company, signed on behalf of the Interna-

tional Union of Mine, Mill and Smelter Workers by Reid Robinson, Van D. Jones, C. J. McDaniel, E. T. Patterson, J. M. Lemley, and Frank Allen, officers and representatives of said Union, and on behalf of the Company by E. M. Ball, General Superintendent of Ore Mines.

Section 4 of the contract relating to hours of work was as follows:

"Section 4—Hours of Work. Eight (8) hours shall constitute a day's work and forty (40) hours shall constitute a week's work. Time and one-half shall be paid for all overtime in excess of eight (8) hours in any one day or for all overtime in excess of forty (40) hours in any one week.

"The eight (8) hour day means eight hours of work in or about the mines at the usual working places for all classes of labor, exclusive of the lunch period, whether they be paid by the day or be paid on the tonnage basis."

Tennessee Coal, Iron & Railroad Company's Exhibit No. 14 sets out in full said contract.

(b) On May 31, 1937, a contract was entered into between the Tennessee Coal, Iron and Railroad Company and the Brotherhood of Mine Workers of Captive Mines (the predecessors of defendant locals of the Red Ore Miners Union, affiliated with the American Federation of Labor) on behalf of its members employed by the Company, and signed as representatives of those employees who are members of the Brotherhood of Mine Workers of Captive Mines, Ore Mines Division, by Stanley I. Hudnall, E. A. Best, T. J. Massey, Paul Dumas, J. W. Wilson, John McGhee, J. Smith, and Julian Hicks, officers of said

Union, and on behalf of the Company by E. M. Ball, General Superintendent, Ore Mines, and J. F. Vance, Manager of Industrial Relations.

Section 4 of the agreement relating to hours of work contained the following provisions:

"Section 4—Hours of Work. Eight (8) hours shall constitute a day's work and forty (40) hours shall constitute a week's work. Time and one-half shall be paid for all overtime in excess of eight (8) hours in any one day or for all overtime in excess of forty (40) hours in any one week.

"The eight (8) hour day means eight hours of work in or about the mines at the usual working places for all classes of labor, exclusive of the lunch period, whether they be paid by the day or be paid on the tonnage basis."

Tennessee Coal, Iron and Railroad Company's Exhibit No. 18 sets out in full said contract.

(c) On June 15, 1938, a contract was entered into between the Tennessee Coal, Iron and Railroad Company and the Brotherhood of Mine Workers of Captive Mines (the predecessor of defendant locals of the Red Ore Miners Union affiliated with the American Federation of Labor) on behalf of its members employed by the Company, and signed as representatives of those employees who are members of the Brotherhood of Mine Workers of Captive Mines, Ore Mines Division, by J. W. Wilson, E. A. Best, T. J. Massey, I. V. Robinson, W. R. Maxwell, Stephen Jackson, James A. Bailey, and Hays Judkin, Sr., officers of said Union, and on behalf of the Company by E. M. Ball, General Superintendent, Ore Mines, and J. F. Vance, Manager of Industrial Relations.

Section 4, relating to hours of work, contained provisions identical with Section 4 of the contract of May 31, 1937.

Tennessee Coal, Iron and Railroad Company's Exhibit No. 19 sets out in full said contract.

(d) On June 29, 1939, a contract was entered between the Tennessee Coal, Iron and Railroad Company and the Red Ore Miners Union, affiliated with the American Federation of Labor (the successor of the Brotherhood of Mine Workers of Captive Mines), on behalf of its members employed by the Company, and signed by S. E. Roper, J. W. Wilson, T. J. Massey, Willis Cole, W. R. Maxwell, John McGhee, James A. Bailey, and George E. Moon, officers of such union, and on behalf of the Company by E. M. Ball, General Superintendent, Ore Mines, and J. F. Vance, Manager of Industrial Relations.

Section 4 of this contract, relating to hours of work, contained the following provision:

"Section 4—Hours of Work. Eight (8) hours shall constitute a day's work and forty (40) hours shall constitute a week's work. Time and one-half shall be paid for all overtime in excess of eight (8) hours in any one day or for all overtime in excess of forty (40) hours in any one week.

"The eight (8) hour day means eight hours of work in or about the mines at the usual working places for all classes of labor, exclusive of the lunch period, whether they be paid by the day or be paid on the tonnage basis."

On December 23, 1940, this contract was extended by an agreement on behalf of the Red Ore Miners, signed

by J. W. Wilson, Chairman, Executive Committee, on behalf of the Union, and by W. J. Kelly, Acting Manager of Industrial Relations, on behalf of the Company, to January 31, 1941.

Tennessee Coal, Iron and Railroad Company's Exhibit No. 20 sets out in full said contract.

(e) On May 5, 1941, an agreement was entered into between the Tennessee Coal, Iron and Railroad Company and the International Union of Mine, Mill and Smelter Workers on behalf of its members employed by the Company, and signed on behalf of the International Union of Mine, Mill and Smelter Workers by Allen D. McNeil, Van D. Jones, Frank Allen, W. C. Gunnin, and E. A. Sizemore, officers and representatives of said Union, and on behalf of the Company by E. M. Ball, General Superintendent, Ore Mines, and W. J. Kelly, Acting Manager of Industrial Relations.

Section 4, relating to hours of work, contained the following provisions:

"Section 4. * * *

"b. The normal hours of work shall be eight (8) per day and forty (40) per week. The daily hours of work shall be consecutive except for such rest periods as may be provided in accordance with practices heretofore prevailing in the ore and limestone mines of the Company.

"c. The eight (8) hour day means eight hours of work in or about the mines at the usual working places for all classes of labor, exclusive of the lunch or rest periods as provided for in (b) above, whether they be paid for the day or be paid on the tonnage basis, less such travel-

ing time as is reasonably necessary for the employees to go to and from their usual working place, such traveling time starting when the employee is required to report for transportation at the entrance of the mine and ending when he returns to that point."

Tennessee Coal, Iron and Railroad Company's Exhibit No. 51 sets out in full said contract.

The above described written contracts constitute all of written contracts executed by TCI with representatives of its employees.

54. Republic Steel Corporation at no time prior to the commencement of the trial of this action entered into any written contracts between itself and any union of its said ore mining employees.

55. Sloss-Sheffield Steel & Iron Company, prior to the commencement of the trial of this case, entered into the following described written contracts with certain of its iron ore mining employees represented by the following described representatives and containing, among other things, the following described agreements:

(a) On July 21, 1936, a contract was entered into between the Sloss-Sheffield Steel & Iron Company and representatives of employees of its red ore mines, signed on behalf of the employees by John Hill, Jessie Gaines, W. A. O'Neill, and W. H. Gunter, employees' representatives, and on behalf of the Company by Ben Davis.

Section No. 11(a) of the contract, relating to hours of work, was as follows:

"An eight-hour day and five days per week for employees shall prevail, exclusive of the lunch period. The

eight-hour day means eight hours of work at the usual working places, exclusive of the lunch period."

Sloss-Sheffield Steel & Iron Company's Exhibit No. 8 sets out in full said contract.

(b) On September 13, 1937, a contract was entered into between Sloss-Sheffield Steel & Iron Company and representatives of employees of its red ore mines, signed on behalf of the employees by John Hill, W. A. O'Neill, and Jessie Gaines, employees' representatives, and on behalf of the Company by Ben Davis.

Section 11(a) of the contract, relating to hours of work, was as follows:

"11(a). An eight-hour day and five days per week for employees shall prevail, exclusive of the lunch period. The eight-hour day means eight hours of work at the usual working places."

Sloss-Sheffield Steel & Iron Company's Exhibit No. 9 sets out in full said contract.

(c) On October 3, 1938, the contract referred to in (b) above was extended for twelve months and the expiration date changed to September 13, 1939. See Sloss-Sheffield Steel & Iron Company's Exhibit No. 13.

(d) On September 9, 1938, a contract was entered into between Sloss-Sheffield Steel & Iron Company and Sloss Red Ore Local No. 109, International Union of Mine, Mill and Smelter Workers, signed on behalf of Sloss Red Ore Local No. 109 by John Hill, Jessie Gaines, W. H. Gunter, of Executive Committee, and Van D. Jones, Board Member, District No. 5, International Union of Mine, Mill and

Smelter Workers, and on behalf of the Company by Ben Davis.

Section 5(a) of the contract, relating to hours of work, was as follows:

"Eight hours of work per day shall constitute a day's work and forty hours shall constitute a week's work. The eight-hour day means eight hours of work at the usual working place, exclusive of lunch period."

Sloss-Sheffield Steel & Iron Company's Exhibit No. 15 sets out in full said contract.

(e) On September 11, 1940, a contract was entered into between Sloss-Sheffield Steel & Iron Company and Sloss Red Ore Local No. 109, International Union of Mine, Mill and Smelter Workers, signed on behalf of Sloss Red Ore Local No. 109 by John Hill, Jessie Gaines, W. A. O'Neill, of Executive Committee, and Van D. Jones, Board Member, District No. 5, International Union of Mine, Mill and Smelter Workers, and on behalf of the Company by Roy Ratliff, General Manager.

Section 4(a) of the contract, relating to hours of work, was as follows:

"Eight hours work per day shall constitute a day's work and forty hours shall constitute a week's work. The eight-hours per day means eight hours of work at the usual working place, exclusive of the lunch period."

Sloss-Sheffield Steel & Iron Company's Exhibit No. 18 sets out in full said contract.

(f) On March 17, 1941, Ruffner Iron Ore Miners Union No. 312 of the International Union of Mine, Mill & Smel-

ter Workers, signed by Ruffner Iron Ore Miners Union No. 512 by Frank Parker, President, Hosea Bickerstaff, Vice-President, George F. Drummond, Chairman, Executive Board, and Van D. Jones, Board member, District No. 5, International Union of Mine, Mill and Smelter Workers, and on behalf of the Company by Roy Ratliff, General Manager.

Section 4(a) of the contract, relating to hours of work, was as follows:

"Eight hours per day shall constitute a day's work and forty hours shall constitute a week's work. The eight hours per day means eight hours of work at the usual working place, exclusive of the lunch period."

Sloss-Sheffield Steel & Iron Company's Exhibit No. 51 sets out said contract in full. The above described written contracts constitute all of the written contracts executed by Sloss-Sheffield Steel & Iron Company with representatives of its employees.

56. Woodward Iron Company, prior to the commencement of the trial of this case, entered into the following described written contracts with certain of its iron ore mining employees represented by the following described representatives and containing, among other things, the following described agreements:

(a) On October 2, 1937, a contract was entered into between Woodward Iron Company and Lipscomb Red Ore Local No. 103 for members of the International Union of Mine, Mill and Smelter Workers.

Among the provisions of this contract were the following sections:

"1. Eight hours shall constitute a maximum schedule day's work and forty hours a maximum schedule week's work.

"2. Time and one-half shall be paid for all time in excess of eight hours in any one day and for all time in excess of forty hours in any one week."

Sloss-Sheffield Steel & Iron Company's Exhibit No. 30 sets out said contract in full.

(b) On November 13, 1939, a contract was entered into between Woodward Iron Company and Lipscomb Red Ore Local No. 103, International Union of Mine, Mill and Smelter Workers, on behalf of the members employed by the Company in its ore mine located at Lipscomb, Jefferson County, Alabama, signed on behalf of said union by Van D. Jones, J. L. Robinson, John Crumpton, Oliver Johnson, and Will Rencher, officers of said union, and on behalf of the Company by H. A Berg, President.

Section 4 of said contract, relating to hours of work, was as follows:

"Section 4—Hours of Work. Eight (8) hours shall constitute a day's work and forty (40) hours shall constitute a week's work. Time and one-half shall be paid for all overtime in excess of eight (8) hours in any one day or for all overtime in excess of forty (40) hours in any one week."

Sloss-Sheffield Steel & Iron Company's Exhibit No. 34 sets out in full said contract.

(c) On December 30, 1940, a contract was entered into between Woodward Iron Company and Lipscomb Red

Ore Local No. 103, International Union of Mine, Mill and Smelter Workers, on behalf of the members employed by the Company in its ore mine located at Lipscomb, Jefferson County, Alabama, signed on behalf of said union by Van D. Jones, J. L. Robinson, Will Colvin, John Crompton, Carl Vanderburg, Jewett Warren, Will Rencher, and John W. White, officers of said Union, and on behalf of the Company by H. A. Berg, President.

Section 4 of said contract, relating to hours of work, was as follows:

"Section 4—Hours of Work. Eight (8) hours shall constitute a day's work and forty (40) hours shall constitute a week's work. Time and one-half shall be paid for all overtime in excess of eight hours in any one day or for all overtime in excess of forty (40) hours in any one week."

Sloss-Sheffield Steel & Iron Company's Exhibit No. 36 sets out said contract in full.

The above described written contracts constitute all of the written contracts executed by Woodward Company with representatives of its employees.

57. During the period of the pendency of each of the written contracts as described in the above numbered findings from 53 through 56, inclusive, the Tennessee Coal, Iron and Railroad Company, Sloss-Sheffield Steel & Iron Company, and Woodward Iron Company, respectively, and Woodward Iron Company, respectively, and their respective employees, operated under the respective contracts in regard to wages, hours of service, and conditions of employment.

58. The words: "the eight-hour day means eight hours of work in and about the mines at the usual working places for all classes of labor" as they appear in the contracts described in the above findings from 53 through 56, inclusive, were at all times understood by the contracting parties to mean that the underground iron ore mining employees should not receive any compensation for any of the time expended daily by them in traveling after reporting at the mouth of the mine until they left the mouth of the mine at the end of the workday.

59. Prior to the enactment of the Fair Labor Standards Act of 1938, plaintiff's underground iron ore mining employees never made any effort to obtain compensation for all of the traveling time spent by them daily after reporting at the mouth of the mine until they left the mouth of the mine at the end of the workday. They knew they were not receiving compensation for such traveling time and with such knowledge signed either twice a month or four times a month written receipts (which did not include compensation for such traveling time) acknowledging payment in full for all compensation due to them from the plaintiff at the time of the signing of such receipts.

60. After the 13th day of June, 1935, up to and including October 24, 1938, plaintiff's underground iron ore mining employees never made any effort to obtain compensation for any of the traveling time spent by them daily after reporting at the mouth of the mine until they left the mouth of the mine until they left the mouth of the mine at the end of the workday. They knew they were not receiving compensation for such traveling time and with such knowledge signed either twice a month or four times a month written receipts (which did not include compensation for such traveling time) acknowledg-

ing payment in full for all compensation due to them from the plaintiff at the time of the signing of such receipts.

61. Prior to October 24, 1938, it has been substantially the universal custom in all of the iron ore underground mines in the United States that the underground miners therein should not receive compensation for traveling time.

62. Prior to October 24, 1938, the underground ore mining employees did not receive in any of the iron ore mines of the United States (so far as this evidence discloses) compensation for traveling time expended daily by them after reporting at the mouth of the mine until they left the mouth of the mine at the end of the workday.

63. Prior to October 24, 1938, in all of the iron ore mines of the United States (so far as this evidence discloses) underground ore mining employees have always been paid on the basis of their time being computed at their usual working places, and have never been paid for all of the time spent by them in being transported or in of the time spent by them in being transported or in traveling to and from such usual working place.

64. Since the year 1933, and until May 1, 1941, Tennessee Coal, Iron and Railroad Company's employees employed as red ore miners have been paid compensation upon a basis which computed the compensation on the number of hours to be spent daily by said employees at the face of the ore seam or specified places or stations in the mines. This compensation, during such period of time, was based upon a precise number of hours to be spent daily at the face of the seam or at a specified place or station in the mines. During such

period, if such employees spent more than the number of such hours to be spent at the face of the ore seam or at the specified place or station in the mines, they received compensation for overtime for such excess. If they spent less than the number of such hours to be spent at the specified place or station in the mines, they received compensation for the period of hours upon which their compensation was computed.

65. In the year 1933 plaintiff, Tennessee Coal, Iron and Railroad Company, instituted in all of its underground iron ore mines the eight-hour day, and since such time, up until May 1, 1941, all of its underground ore mining employees have had their compensation computed, and have received compensation on the basis of eight hours of work daily at their usual working place and excluding traveling time, and if, during such time, any of such employees worked more than eight hours daily at their usual working places, such employees received overtime compensation therefor; and if any of such employees worked less than eight hours at their usual working places, they received compensation for the eight hours.

66. Since the year 1933, and until May 1, 1941, the job of each underground ore mining employee of the Tennessee Coal, Iron and Railroad Company was evaluated by the Company on the basis of eight hours daily work by such employee at the usual working place, and the compensation received by such employee was computed on such basis.

67. Since October 24, 1938, the underground ore mining employees of the plaintiff have at all times been paid by the plaintiff and received compensation in excess of thirty cents per hour for each hour spent by such employee underground.

68. Since October 24, 1938, all of the underground ore mining employees of the plaintiff have received compensation in excess of the minimum required by the Act.

69. Since October 24, 1938, and until May 1, 1941, plaintiff has paid its underground ore mining employees in excess of the minimum compensation required by the Act, and has paid such employees time and a half for all overtime, in strict compliance with the provisions of the Act, the working time of such employees being computed on the basis of the time spent at the usual working place, not including traveling time.

70. Since January, 1937, and until May 1, 1941, the minimum rate per hour paid by the plaintiff, Tennessee Coal, Iron and Railroad Company, to its underground ore mining employees has been 54½ cents per hour, and the average rate for all such employees has been not less than 68 cents per hour, their time being computed on the basis of time spent at their usual working places; and during such time the plaintiff has paid its employees at the rate of time and a half for all overtime spent in excess of eight hours, excluding travel time.

71. At all times since October 24, 1938, and until May 1, 1941, the minimum rate paid by the plaintiff, Tennessee, Coal, Iron and Railroad Company, to its underground ore mining employees has been 54½ cents per hour and the average rate paid all of its said employees has been not less than 68 cents per hour, with time and a half paid at said regular rates for all overtime in excess of 44 hours per week from October 24, 1938, to October 24, 1939, 42 hours from October 24, 1939, to October 24, 1940, and 40 hours since October 24, 1940 and until May 1, 1941, the time being computed and paid upon the basis

of time spent at their usual working places and excluding traveling time.

72. Prior to October 24, 1938, the plaintiff, in the sale of its manufactured products into which ore produced in its iron ore mines went as an ingredient, was in competition with other manufacturers of like production in other portions of the United States.

73. Prior to October 24, 1938, the plaintiff, in the sale of its manufactured products into which ore produced in its iron ore mines went as an ingredient, was in competition with other Alabama manufacturers of like products.

74. All wage scales of the plaintiff which have been in force and effect since 1933, and until May 1, 1941, have been based upon eight hours of work at the "usual working places", excluding traveling time.

75. All wage scales of the plaintiff which have been in force and effect since 1933, and until May 1, 1941, have been based upon eight hours of work at the usual working places, and all written contracts executed between plaintiff and the Union local defendants have been based upon such eight-hour day.

76. During the period of time between October 24, 1938, and May 1, 1941, the average number of Tennessee Coal, Iron & Railroad Company's underground ore mining employees was approximately 2,650, of which number approximately 60% were service or company employees and 40% were production employees.

77. During the period of time between October 24, 1938, and May 1, 1941, the average number of Republic

Steel Corporation's underground ore mining employees at its Raimund Mines was approximately 580, of which number approximately 46% were service or company employees and 54% were production employees.

(a) Sloss-Sheffield Steel & Iron Company, prior to May 1, 1941, employed approximately 360 men at its Sloss Red Ore Mine, which has been in operation continuously for many years prior to said date; of the 360 men so employed approximately 36% were service or company employees and approximately 64% were production employees. Sloss-Sheffield Steel & Iron Company at the same time employed approximately 120 men at its Ruffner Red Ore Mine, which was put into operation in the Summer of 1940 for the first time in many years; of such employees approximately 75% were production men and approximately 25% were service employees.

(b) In April or May of 1941 Woodward Iron Company employed approximately 540 men underground, of which approximately 60% were production employees and approximately 40% were service or company men.

The Republic Steel Corporation had in its job classification of underground ore mining employees approximately 51 different occupations at its Raimund Mine and approximately 32 different occupations at its Spalding Mine.

80. The conditions found in Findings of Fact Numbers 15 to 27, inclusive, as relating to and covering the period between October 24, 1938, and May 1, 1941, existed in all substantial effect during the approximately sixty-year history of iron ore mining in the Birmingham, Alabama District.

81. Plaintiff objects to the separate and several findings as set forth in the Findings of Fact numbered from

16 to 27, inclusive, on the separate and several grounds heretofore stated, and on the following separate and several additional grounds:

(a) Such findings apply to all of the underground ore mining employees of the plaintiff, whereas the evidence shows that the facts so found apply only to a small portion of such employees.

(b) Such findings apply to all of the underground ore mining employees of the plaintiff, whereas the evidence shows that they only apply to some of the production employees.

(c) Such findings apply to all of the underground ore mining employees of the plaintiff, whereas the evidence shows that they only apply to some of the service employees.

(d) Such findings are made as being typical of all of the underground mining employees and as of frequent occurrence, whereas the evidence shows that the facts so found are exceptional, instead of typical, and are occasional, instead of frequent.

(e) Such findings apply to all of the underground ore mining employees of the plaintiff at each of its ore mines, whereas the evidence shows that the facts so found do not apply to such employees at other ore mines of the plaintiff.

(f) Such findings do not fairly find the facts.

(g) The evidence does not support the finding of fact in Finding of Fact No. 16, which reads as follows:

"These employees reported for duty,"

in that the evidence shows that as to most, if not all, of such employees, they reported only for transportation to their working places.

(h) The evidence does not support the finding of fact in Finding of Fact No. 17, which reads as follows:

"Plaintiff's employees occasionally obtain and return tools,"

in that the evidence shows that not all, but only a few of such employees occasionally, obtain and return tools.

(i) The evidence does not support the separate and several findings of fact in Finding of Fact No. 18, which reads as follows:

"These employees are daily subject to receive instructions from plaintiff relative to the duties of their employment—They are frequently given their first instructions of the day prior to entering the slope of the mine."

"The head miners are given advice about the operation of their underground stations. The head miner of a crew foreman begins to assemble his crew, to fill any vacancies, and to issue orders to its members,"

in that the evidence shows that only a few, and not all, of said employees thus received instructions from plaintiff, and those who did receive such instructions received them occasionally, and not daily, and the instructions given were in relation to places of work and conditions of these places, and not in reference to the performance of duties at these places of work, and only a few of the head miners, and none of the crew-foremen, began to assemble crews, or fill vacancies, or issue orders to its members.

(j) The evidence does not support the findings of fact in Finding of Fact No. 18, which reads as follows:

"The check-in board or the actual checking-in at the tally house informs officers or plaintiffs that members of the respective crews have reported for work, and these employees are forbidden to the plaintiff's mine until their brass checks have been deposited or until they have been checked-in at the tally house. * * * At this point vacancies in working crews are ordered filled by Company officials.",

in that the finding fails to state, though the undisputed evidence so shows, that the depositing at the entrance and taking up upon exit of checks has been a custom, not only as found within the period from October 24, 1938, to May 1, 1941, but for approximately 30 years prior thereto; that such checking-in was not for the purpose of informing officials of plaintiff that members of the respective crews had reported for work, but was to enable the Company for purposes of safety to have information as to what men had entered the mines and what men had made their exit therefrom, and to enable the foreman to supply vacancies occasionally on the surface, but usually by telephone or messages sent inside.

(k) The evidence does not support the findings of fact in Finding of Fact No. 19, in that the conditions therein found to have existed in all of the underground mines are not correctly or fairly stated. Said conditions are stated only as having existed during the period of time between October 24, 1938, to May 1, 1941, although the undisputed evidence shows that such conditions (with the exception that there has been improvement in recent years) have always substantially existed in the ore mines in the Birmingham, Alabama, District; said conditions

are stated as if they applied particularly to the iron ore mines in the Birmingham, Alabama, District, although the undisputed evidence shows that they were not conditions peculiar to these mines, but were conditions in reference to which underground employees in all iron ore mines in the United States were subject, and were no worse in the Alabama mines, or, as stated in the opinion of the Court:

"These conditions may well be normal conditions in iron ore mines, and practically inevitable,"

said conditions are stated as if, as a proximate result thereof, the underground ore mining employees have been frequently injured, their health undermined, and bodies maimed or lives lost, although the evidence establishes that injuries received as a proximate result of any of such conditions have been occasional, instead of frequent, and resulted not from the existence of the conditions, but because of the lack of care on the part of the persons injured; said conditions have been stated as if the air, ventilation, and heat in plaintiff's mines were so poor and bad as to endanger life, body, and health, when the evidence discloses that as a matter of fact the ventilation, instead of being relatively poor, has been normally good, and the temperature in the mine, instead of being a matter of danger or discomfort, has in the main been uniform, and certainly not abnormal; said conditions are stated as if they existed in all of plaintiff's ore mines, when the evidence shows without contradiction that in some of these mines most, if not all, of such conditions did not exist at all.

(1) The evidence does not support the findings of fact in Findings of Fact No. 20, in that the evidence shows that only a few of the employees reported at the

mouth of the mines for any purpose other than to deposit their checks, and because the finding fails to state, although the undisputed evidence shows, that such employees were not required to report to their immediate superiors and were not required (with the possible exception of drillmen) to catch any particular trip, but had the privilege of riding on any trip they elected to ride on, provided they reached their usual place of work at the time computation of the workday began.

(m) The evidence does not support the findings of fact in the separate and several Findings of Fact numbered 21, 22, 23, 24, 25, 26, and 27, in that the findings read as if the underground ore mining employees of plaintiff were at all times, during the conditions set forth, under the supervision, control, and rules of the plaintiff, and all of the time are subject to the conditions set forth in such findings, as if conditions had existed only during the period of time from October 24, 1938, to May 1, 1941, as if all underground employees at all mines were subject to such control, rules and conditions, and as if the conditions were abnormal and of constant occurrence, instead of being normal and occasional or exceptional occurrences, when the evidence shows that such employees when traveling in the vehicle or in walking to their usual places of work were never under the orders, supervision, or control of their bosses who had charge of them when they began their work at their usual places of work, were never subject to any rules or any control or any discipline while being transported which did not relate solely to the safety of all who were riding on the vehicle, that the conditions in reference to supervision, control and physical conditions of mines, roofs, etc., had existed many years prior to October 24, 1938, and have been substantially the same, any change therein having been an improvement; that only a part

of the employees in all of the mines were subject to such orders, control, conditions or dangers, and that none of the employees in some of the mines were so subjected, and said conditions, instead of being unusual or peculiar to mines in the Alabama District were normal, if not better, than iron ore mines generally throughout the United States, and particularly in Minnesota.

82. Plaintiff objects to the separate and several findings as set forth in the Findings of Fact numbered 28 and 29 on the separate and several grounds heretofore stated, and on the following separate and several additional grounds:

(a) Said findings relate to issues which were not set for trial and have never been tried by this Court;

(b) They adjudicate matters as to which plaintiff has never had its day in Court;

(c) They adjudicate matters as to which evidence was not offered on the trial of the sole issue which has been tried, namely, as stated by the Court: "What I am going to try to determine is what constitutes a 'workweek.'"

83. All underground ore mining employees of the plaintiff, on entering the mine, could catch such trip of the several trips operated by the plaintiff as he wished to catch, provided he reached his usual working place not later than 6:45 A. M. or 6:45 P. M., depending on whether he worked on the day shift or the night shift.

84. All underground ore mining employees of the plaintiff, on entering the mine, could catch such trip of the several trips operated by the plaintiff as he wished to catch, provided he reached his usual working place not

later than the time used by the employer for the purpose of computing his workday.

85. The only supervision or control that the plaintiff exercised over the loading of the men into the vehicles in which they were transported in and out of the mine and the only rules of conduct prescribed and in force during the trips in and out of the mines were those relating to the safety of the men riding in the vehicles.

86. The only supervision or control that the plaintiff exercised over the loading of the men into the vehicles in which they were transported in and out of the mine and the only rules of conduct prescribed and in force during the trips in and out in such vehicles were those relating to the safety of the men riding in the vehicles.

87. Plaintiffs did not require the men to ride rather than to walk in going from the mouth of the mine to the underground loading station or in returning from the underground loading station to the mouth of the mine.

88. The only employees of the plaintiff required to ride particular trips of the vehicles on which the men were transported into and out of the mines were the drill men.

89. The conditions found in Finding of Fact No. 24 are not peculiar to the underground iron ore mines of the companies in the Alabama District, but are also peculiar to underground iron ore mines in other portions of the country.

90. The conditions found in Findings of Fact No. 24 are not peculiar to the underground iron ore mines of the companies in the Alabama District, but are peculiar

to underground iron ore mines in other portions of the country, and may well be normal conditions in iron ore mines generally, and practically inevitable.

91. The conditions of the slopes of the plaintiff's mines and the haulageways and walkways utilized by said employees in moving between the underground manloading stations and the face of the seam and return, and the vehicles used to lower and raise plaintiff's red ore miners, have been substantially the same during the approximately six-year history of iron ore mining in the Birmingham, Alabama District.

92. In walking between the underground unloading station and the face of the seam and return, the employees encounter an increasingly warmer and humid atmosphere with increasingly less effective ventilation. At points the walkers are required to stoop to avoid collision with the roof, footing is irregular, sometimes rough, sometimes wet and slippery, and sometimes marked by overhead uninsulated wires and pipes underfoot. The many ways utilized in this walking involves grades of varying steepness. After negotiating the distance between the underground manloading station and the face of the seam, a miner is often wet with perspiration. These conditions as existing in Alabama mines are found, not for the purpose of censure of plaintiff's manner of maintenance of their mines, for these conditions may well be normal conditions in iron ore mines and practically inevitable.

93. In walking between the underground unloading station and the face of the seam and return, the employees encounter an increasingly warmer and humid atmosphere with increasingly effective ventilation. At points the walkers are required to stoop to avoid collision

with the roof, footing is irregular, sometimes rough, sometimes wet and slippery, and sometimes marked by overhead uninsulated wires and pipes underfoot. The manways utilized in this walking involves grades of varying steepness. After negotiating the distance between underground manloading station and the face of the seam, a miner is often wet with perspiration. These conditions are normal conditions in iron ore mines.

94. From the time plaintiff's employees enter the mouth of the mine until their exit from the mouth of the mine, they are subject to conditions peculiar to their occupation and employment in ore mines. These conditions are normal conditions in iron ore mines.

95. The conditions of the slopes of plaintiff's mines, of the haulageways and walkways utilized by said employees in moving between the underground manloading stations and the face of the seam and return, and the vehicles used to lower and raise plaintiffs' red ore miners, have been substantially the same during the approximately 60-year history of iron ore mining in the Birmingham, Alabama District, and until May 1, 1941, and if there has been any substantial change in such condition in the past 10 years, and up until the present time, such change has been by way of improvement for the comfort and safety of the employees.

96. It has always been the custom under which plaintiff's employees received compensation for their work that the Company or service men were paid and received compensation only and solely for the time actually spent at their usual working place, and such employees never at any time were paid or received compensation for the time spent by them in going to and from such actual working places.

97. The so-called Company or service men employed by plaintiff to work underground have always been paid and have received compensation on a basis of the number of hours spent at their usual working places and have never been paid on a shift or other basis arbitrarily computing the number of hours worked. Such employees have never been paid or received compensation for the time spent by them in going to and from their actual working places nor have they ever been paid or received compensation on any other basis than at their agreed hourly rate for the number of hours actually spent by them at their actual working places.

98. During the approximately 60-year history of iron ore mining in the Birmingham, Alabama District, substantially the same customs and practices that existed in plaintiff's mines from October 24, 1938, to May 1, 1941, namely, the appearance at the mouth of the mine of the underground mining employees in their mining clothes and with their carbide lights, both clothes and lights being owned by the miner, have existed, and substantially the same vehicles and method of transportation between the mouth of the mine and the underground manloading station, substantially the same conditions as to comfort, changes in temperature, risk of injury by collision with low points in the roof of the mine slope or with projections from these roofs, and substantially the same conditions as to air, ventilation, and heating have always existed during this period of time.

99. Plaintiff assigns as additional grounds to its objections to the findings of fact all of the grounds of objections assigned by it to the conclusions of law found and filed herein.

100. Plaintiff also assigns as objections to the findings of fact each and every objection heretofore assigned to

the judgment, to the motion to amend the judgment and to the conclusions of law.

Plaintiff moves the Court to amend its findings by sustaining the separate and several objections from 1 to 100, both inclusive, herein made and separately moves the Court to make the additional findings of fact stated herein in 19 to 80, inclusive (with the exception of 46), and 83 to 97, inclusive, and it makes such motions, separately and severally, as to each separate and several paragraphs above referred to.

E. L. ALL,
BORDEN BURR,
Attorneys for Tennessee Coal, Iron and Railroad Company, Plaintiff.

Address: Brown-Marx Building,
Birmingham, Alabama.

I hereby certify that a copy of all of the foregoing has this day been served upon Crampton Harris and J. Q. Smith, Attorneys of Record for Defendants, and Jerome A. Cooper, Attorney of Record for Defendant-Intervener.

This 20th day of September, 1941.

BORDEN BURR,
Attorneys for Tennessee Coal, Iron and Railroad Company, Plaintiff.

Filed September 19, 1941.

## 605 OBJECTIONS TO CONCLUSIONS OF LAW.

(Civil Action No. 5232.)

Comes plaintiff, Tennessee Coal, Iron & Railroad Company, a corporation, and objects to the conclusions of law filed by the Court on September 10, 1941, on the following separate and several grounds, such objections being made separately and severally to the conclusions of law as a whole and separately and severally to each numbered paragraph thereof:

1. The conclusions of law are not properly related to the issues tried and determined by the Court.

2. The conclusions of law are not supported by the law as applicable to the facts in the case.

3. The conclusions of law are contrary to the law under the pleadings and proof of the case.

4. The conclusions of law are insufficient and inadequate to support the judgment or decree of the Court.

5. The conclusions of law are insufficient and inadequate to support the judgment or decree of the Court, in that they fail to declare the law of the case under the pleadings and proof of the case.

6. The alleged conclusions of law are not conclusions of law but are findings of fact.

7. The conclusions of law relate to all plaintiff's underground ore mining employees in all plaintiff's underground ore mines, and such conclusions of law are not applicable under the pleadings and proof to the under-

ground ore mining employees at plaintiff's Number 4 mine at Muscoda.

8. The conclusions of law relate to all plaintiff's underground ore mining employees in all plaintiff's underground ore mines and such conclusions of law are not applicable under the pleadings and proof to the underground ore mining employees at plaintiff's Number 5 limestone mine at Muscoda.

9. The conclusions of law relate to all plaintiff's underground ore mining employees in all plaintiff's underground ore mines and such conclusions of law are not applicable under the pleadings and proof to the underground ore mining employees at plaintiff's Number 6 mine at Muscoda.

10. The conclusions of law relate to all plaintiff's underground ore mining employees in all plaintiff's underground ore mines and such conclusions of law are not applicable under the pleadings and proof to the underground ore mining employees at plaintiff's Number 7 mine at Wenonah.

11. The conclusions of law relate to all plaintiff's underground ore mining employees in all plaintiff's underground ore mines and such conclusions of law are not applicable under the pleadings and proof to the underground ore mining employees at plaintiff's number 8 mine at Wenonah.

12. The conclusions of law relate to all plaintiff's underground ore mining employees in all plaintiff's underground ore mines and such conclusions of law are not applicable under the pleadings and proof to the underground ore mining employees at plaintiff's Number 9 mine at Wenonah.

13. The conclusions of law relate to all plaintiff's underground ore mining employees in all plaintiff's underground ore mines and such conclusions of law are not applicable under the pleadings and proof to the underground ore mining employees at plaintiff's Number 10 mine at Wenonah.

14. The conclusions of law relate to all plaintiff's underground ore mining employees in all plaintiff's underground ore mines and such conclusions of law are not applicable under the pleadings and proof to the underground ore mining employees at plaintiff's Number 11 mine at Ishkooda.

15. The conclusions of law relate to all plaintiff's underground ore mining employees in all plaintiff's underground ore mines and such conclusions of law are not applicable under the pleadings and proof to the underground ore mining employees at plaintiff's Number 13 mine at Ishkooda.

16. The conclusions of law as to the time included in the time worked by plaintiff's underground ore mining employees is too uncertain and indefinite in that it does not definitely and certainly appear as to when or where, within the meaning of Section 7 of the Fair Labor Standards Act of 1938, the time worked by the underground mining employees begins or ends.

17. The conclusions of law as to the time included in the time worked by plaintiff's underground ore mining employees is too uncertain and indefinite, in that it does not definitely and certainly appear as to when or where, within the meaning of Section 7 of the Fair Labor Standards Act of 1938, the time worked by the underground mining employees begins or ends, in that such conclusion

includes in the time worked by plaintiff's underground ore mining employees the aggregate of all time spent on the surface in obtaining lamps, carbide, and tools and in checking in and out, and all the time from the time the underground ore mining employees report at or near the collar of the mine until they reach the collar at the end of the shift, which time, under the evidence, is or may be a part of the aggregate of the time spent on the surface.

18. It is impossible, under the conclusion of law as found in paragraph numbered three or conclusions of law, for plaintiff or defendants to determine the time for which, within the meaning of Section 7 of the Fair Labor Standards Act of 1938, plaintiff's underground ore mining employees are to receive compensation.

19. Conclusion of law numbered four is a finding of fact and not a conclusion of law.

20. Conclusion of law numbered four is not supported by the evidence and is not properly related to the evidence.

21. Conclusion of law numbered four is not supported by the evidence and is not properly related to the evidence, in that the undisputed evidence shows that plaintiff's underground ore mining employees were subject to discipline, control and supervision of plaintiff only in relation to matters of safety and not in relation to the performance of work.

22. Conclusion of law numbered four is not supported by the findings of fact and is not properly related to the findings of fact.

23. The facts incorporated in the conclusions of law as a basis for such conclusions are contrary to the evidence in the case.

24. The facts incorporated in the conclusions of law as a basis for such conclusions are contrary to the overwhelming weight of the evidence.

25. The facts incorporated in the conclusions of law as a basis for such conclusions are not sufficiently supported by the evidence in the case.

26. Such conclusions of law are mere conclusions and have not a sufficient supporting base either in law or in fact.

27. Such conclusions of law are not within the issues which have been tried and heard by the Court.

28. The only issue in this case which has been heard and tried by the Court is the judicial declaration as to what constituted the working time of plaintiff's underground ore mining employees within the meaning of Section 7 of the Fair Labor Standards Act of 1938, and such conclusions of law improperly and irrelevantly include matters which have no bearing on such question.

29. Conclusion of law numbered six that "the failure of plaintiff to compensate its employees for time worked within the meaning of the Act as set out above can not prevail to deny those employees compensation to which they are entitled under the Act", is a conclusion in reference to a matter which has not been tried or heard in this case.

30. Conclusions of law numbered seven that "the employees of plaintiff have not waived their right to lawful compensation, nor have they estopped themselves to claim the same", is a conclusion in reference to a matter which has not been tried or heard in this case.

31. Conclusion of law numbered eight, that "plaintiff has violated Section 7 of the Act by failing to pay its employees for all time worked since October 24, 1938, in excess of the hours provided in Section 7 of the Act, at time and one half their regular rate of pay", is a conclusion in reference to a matter which has not been tried or heard in this case.

32. Conclusion of law numbered ten is uncertain and indefinite, in that it does not appear therefrom as to what period of time such conclusion of law relates; that is to say, as to whether or not it relates only to the period from the effective date of the Act to May 1, 1941, or whether it relates to the period subsequent to May 1, 1941.

33. Said conclusions of law utterly fail to state a conclusion of law as to whether or not under the pleadings and the proof the time spent by plaintiff's underground ore mining employees in traveling should be included as a part of the work-week of such employees.

34. The conclusions of law are insufficient to state a conclusion of law in reference to the sole issue tried in this case, namely: Whether or not traveling time, as such, of the underground ore mining employees, should be included as a part of their work-week.

35. Said conclusions of law, so far as defendant intervener is concerned, fails to in any way state a conclusion of law in reference to the issues raised and evidence presented thereon from May 1, 1941, up to the beginning of the trial of this case.

36. Plaintiff also assigns as objections to the conclusions of law each and every objection assigned to the findings of fact:

37. Plaintiff also assigns as objections to the conclusions of law each and every objection assigned to the judgment rendered here in and in support of its motion to amend such judgment.

E. L. ALL,
BORDEN BURR,
Attorneys for Tennessee Coal, Iron & Railroad Company, a corporation.

Copy of the foregoing has this day been served on Crampton Harris and J. Q. Smith, attorneys of record for all original defendants, and Jerome Cooper, attorney for defendant intervener.

This 20 day of September, 1941.

BORDEN BURR,
Attorney for Plaintiff.

Filed September 19, 1941.

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611 MOTION OF PETITIONER-PLAINTIFF TENNESSEE COAL, IRON AND RAILROAD COMPANY FOR A NEW TRIAL.

(Civil Action No. 5232.)

Now comes the plaintiff and moves the Court to grant to the plaintiff a new trial herein, and as grounds of said motion it assigns, separately and severally, the following separate and several grounds:

1. The judgment is against the overwhelming weight of the evidence.

2. The judgment is against the great weight of the evidence.

3. The judgment as rendered adjudicates matters which have not been heard or tried by the Court.

4. The judgment as rendered as illegal and improper for the several and separate reasons set forth in plaintiff's motion to amend the judgment.

5. Plaintiff assigns as grounds for its motion for a new trial, separately and severally:

(a) The action of the Court in overruling its motion to amend the judgment;

(b) The action of the Court in overruling its objections to the judgment.

6. Plaintiff assigns as separate and several grounds in support of its motion for a new trial the several and separate grounds heretofore assigned by it as reasons for its motion to amend the judgment herein, and as grounds of its objections to such judgment, and being grounds numbered from (a) to (l), inclusive, as such grounds appear in support of its motion to amend the judgment and its objections to the judgment as rendered herein.

7. The Court committed error in overruling plaintiff's motion to amend the judgment.

8. The Court committed error in overruling plaintiff's objections to the judgment as rendered herein.

9. The Court erred in its separate and several conclusions of law as filed herein.

10. The Court erred in overruling the separate and several objections of plaintiff to the conclusions of law filed by the Court herein.

11. Plaintiff assigns as separate and several grounds for its motion for a new trial the several and separate grounds which it has heretofore filed herein as objections to the conclusions of law filed herein by the Court.

12. The Court erred in its separate and several findings of fact as filed herein.

13. The Court erred in overruling the separate and several objections of plaintiff to the findings of fact filed by the Court herein.

14. Plaintiff assigns as separate and several grounds for its motion for a new trial the separate and several grounds which it has heretofore filed herein as objections to the findings of fact filed herein by the Court.

15. The separate and several findings of fact filed herein by the Court are contrary to the evidence.

16. The separate and several findings of fact filed herein by the Court are not supported by the evidence herein.

17. The Court erred in overruling plaintiff's motion to amend findings of fact as filed herein by the Court.

18. The Court erred in overruling the separate and several grounds of plaintiff's motion to amend the findings of fact as filed herein by the Court.

19. Plaintiff assigns as separate and several grounds for its motion for a new trial the separate and several

grounds which it has heretofore filed herein in support of its motion to amend findings of fact filed herein by the Court.

20. The Court erred in the following part of its judgment and decree:

"Plaintiff, in not compensating its said underground ore mining employees for all time worked as defined in paragraph 2 hereof in excess of 44 hours weekly between October 24, 1938, and October 23, 1939; in excess of 42 hours weekly between October 24, 1939, and October 23, 1940; and in excess of 40 hours weekly since October 24, 1940, and until May 1, 1941, at the rate not less than one and one-half times the regular rate at which said employees were employed, has violated Section 7 of the Fair Labor Standards Act of 1938."

21. The Court erred in the following part of its judgment and decree:

"Plaintiff, in not compensating its said underground ore mining employees for all time worked as defined in paragraph 2 hereof in excess of 44 hours weekly between October 24, 1938, and October 23, 1939; in excess of 42 hours weekly between October 24, 1939, and October 23, 1940; and in excess of 40 hours weekly since October 24, 1940, and until May 1, 1941, at a rate not less than one and one-half times the regular rate at which said employees were employed, has violated Section 7 of the Fair Labor Standards Act of 1938,"

for that the Court adjudged and decreed that the plaintiff is indebted to its underground employees notwithstanding the agreement between the parties that the sole issue to be tried was what constitutes the "workweek" within the meaning of the Fair Labor Standards Act of 1938.

The Court erred in the following part of its judgment and decree:

"Such employees or their personal representatives as have not filed claims are given sixty days from the date hereof in which to file the same."

23. For that the judgment of the Court adjudging that the plaintiff is liable to its employees for overtime compensation under the Fair Labor Standards Act of 1938 is erroneous in that it adjudicates issues which have not been tried.

24. For that the trial and hearing, as a result of which the judgment in this cause is rendered, was by agreement between the Court and all the parties confined to the one issue, namely what constitutes the "workweek" within the meaning of the Fair Labor Standards Act of 1938.

25. For that the Court in its judgment "went beyond the issues tried upon the hearing of this cause."

26. For that upon the trial of this cause the question of whether or not the plaintiff owed its underground employees overtime compensation was not presented to the Court, nor were the plaintiff's answers and defenses to the claims of plaintiff's employees tried and considered, notwithstanding which the Court in its judgment ordered and decree as follows:

"Plaintiff, in not compensating its said underground ore mining employees for all time worked as defined in paragraph 2 hereof in excess of 44 hours weekly between October 24, 1938, and October 23, 1939; in excess of 42 hours weekly between October 24, 1939, and October 23,

1940; and in excess of 40 hours weekly since October 24, 1940, and until May 1, 1941, at a rate not less than one and one-half times the regular rate at which said employees were employed, has violated Section 7 of the Fair Labor Standards Act of 1938."

27. For that the matter of the trial of the claims of the plaintiff's underground employees and the defenses of those claims have not been tried, and the plaintiffs have had no opportunity to resist or defend against the same.

28. For that the matter of the trial of the claims of the plaintiff's underground employees and the defenses of those claims have not been tried, and the plaintiff has had no opportunity to resist or defend against the same, and plaintiff avers that it has evidence which it believes and has been advised by counsel presents a bona fide defense to said claims, and which defense and evidence it has not had the opportunity to present.

29. The Court erred in the following part of the judgment and decree:

"Jurisdiction of this cause is retained for the purpose of giving full effect to this decree and specifically to adjudge and determine the claims of the employees and their personal representatives for unpaid wages and liquidated damages and to adjudge and to appoint a special master or masters to report thereon, and to determine and fix the fee for the attorneys for the defendants herein."

30. For that said judgment, in the particulars hereinbefore set forth, adjudicated matters without the pleadings in reference to said matters having been disposed of.

In support of grounds 2 to 30, inclusive, of this motion, plaintiff attaches hereto and makes a part hereof affidavit of Borden Burr, E. L. All, and D. M. Carr. Plaintiff, in further support of said motion and each ground thereof, will submit to the Court the record of the trial of said cause, including the various hearings or pleadings or other relevant matters, or such portions thereof as are relevant hereto.

E. L. ALL,
BORDEN BURR,
Attorneys for Tennessee Coal, Iron & Railroad Company, Petitioner and Plaintiff.

Address: Brown-Marx Building,
Birmingham, Alabama.

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616 NOTICE OF HEARING ON MOTION OF PLAINTIFF, TENNESSEE COAL, IRON & RAILROAD COMPANY FOR NEW TRIAL, omitted from the printed record, pursuant to Rule 23 of this Court.

* * * * * * *

I hereby certify that a copy of all of the foregoing has this day been served upon Crampton Harris and J. Q. Smith, attorneys of record for defendants, and Jerome A. Cooper, attorney of record for defendant-intervener.

This 19th day of September, 1941.

BORDEN BURR,
Attorney for Tennessee Coal, Iron & Railroad Company.

Filed September 19th, 1941.

In the District Court of the United States for the Southern Division of the Northern District of Alabama.

Tennessee Coal, Iron & Railroad Company, a Corporation, Petitioner and Plaintiff
vs. Civil Action File No. 5232.
Muscoda Local No. 123, et al, Defendants,

Philip B. Fleming, Administrator, Etc., Intervener.

State of Alabama.
Jefferson County.

Before me, the undersigned authority, personally appeared D. M. Carr who being by me first duly sworn, deposes and says as follows:

My name is D. M. Carr. I am a shorthand reporter, having had more than twenty-five years experience in shorthand reporting before various State and Federal Courts, and bureaus, boards and commissions of various state and federal governments.

Under the employment of the plaintiff in the above styled action, and the plaintiffs in Civil Actions Nos. 5233 and 5234, pending in the District Court of the United States for the Southern Division of the Northern District of Alabama, I have been present and reported in shorthand the various Court proceedings in these cases. Among such proceedings in said cases was a hearing held by the above Court on May 19, 1941, which hearing related to various motions made by defendants, proceedings on the pleadings in said cases, and matters relating to a pretrial hearing.

I correctly reported in shorthand on said date, and later transcribed correctly into typewritten matter from my

shorthand notes the hereinafter quoted portion of the proceedings on said date. After the argument of counsel in support of the motions of the defendants affiliated with the CIO to dismiss the bills of complaint and arguments of counsel for the plaintiffs in opposition to such motions, and statements of counsel and of the Court bearing upon the question of the right of the defendants affiliated with the CIO to subsequently file counter-claims the following occurred:

The Court:

As I understand it is a matter of fact, what constitutes a work week, and on that we will take evidence.

Mr. Burr:

Yes, sir.

Mr. Smith:

We may get down to what is really in dispute. In filing our answer we had to say in some cases we didn't have information. That may be true or may not be exactly accurate. It occurs to me if we could get down to the part we can eliminate out of this bill and agree on the issues Your Honor is going to require proof on we would be getting somewhere pretty fast.

The Court:

That is the province of the pre-trial hearing.

Mr. Harris:

There are some things we don't know how to get out.

Mr. Burr:

There are a good many things I don't know how to get in. I have prepared a pre-trial order—

The Court:

Let's have an understanding. Mr. Harris, you will file your answer.

Mr. Burr:

He is going to amend his answer?

Mr. Harris:

Amend our answer and put in claims for all the people we represent.

Mr. Smith:

In the meantime we have in our claims and—this has been pretty fast going—but if necessary to do that, we can change it.

The Court:

While I will make an order on pretrial hearing, if justice requires it there can always be a change.

Mr. Harris:

How much time—

The Court:

This case is set on June 23rd (which date was by order of the Court subsequently changed to July 8, 1941) but you need not necessarily bring all your parties in. On June 23rd what I am going to try to determine is what constitutes a work week.

Mr. Harris:

If we have our claims in three or four days before June 23rd that would be sufficient?

The Court:

It would be a question of proof.

Mr. Smith:

About my claims under 16(b), all people situated under that particular group. Mr. Burr has brought them all in by different groups. If they want to get down finer than that there will be about six thousand.

Mr. Harris:

I think we ought to have two weeks to get in those amendments.

The Court:

You will have ample time before they are set on June 23rd.

Mr. Burr:

That is all right, but I think we ought to save some time, if we can, by agreeing on the things admitted without proof.

The Court:

We are going to go into that in the morning. We fully understand on the 23rd we are going into the sole question of what constitutes the work week.

Mr. Smith:

Your Honor intends to take testimony?

The Court:

Yes, sir.

Mr. Smith:

That is day after tomorrow?

The Court:

No, 23rd of June.

Mr. Smith:
Oh, June.

The Court:
Yes, sir. Suppose we get down to the pleadings, the pleadings in this case.

Mr. Burr:
I have here, "The following pleadings were allowed". I thought we would put the complainants, answers and cross claims.

The Court:
And answer or cross claimed to be filed by—I don't know how many of them.

Mr. Burr:
Why can't you just designate it CIO affiliates?

Mr. Harris:
International Union of Mine, Mill and Smelter Workers.

The Court:
Complaint and answers of defendants, counter claim of A. F. of L. defendants and counter claim of CIO defendants. That is the pleadings. That will constitute the pleadings.

Mr. Burr:
We don't admit it is a counter claim, but it is all right to call it that.

The Court:
It is agreed by all the parties that the following are all the issues of controversy in this case. You can have several issues of controversy, but we are going to have only one on the twenty-third."

D. M. CARR.

Sworn and subscribed before me on this 19th day of September, 1941.

J. W. DICKINSON,
Notary Public.

(Seal)

Filed September 19th, 1941.

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On September 19, 1941, in Civil Action No. 5233 petitioner-plaintiff Sloss-Sheffield Steel & Iron Company filed its Motion for New Trial, said Motion for New Trial, with affidavit of D. M. Carr attached, being identical with the Motion for New Trial and affidavit of D. M. Carr attached filed by petitioner-plaintiff Tennessee Coal, Iron & Railroad Company heretofore set out.

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And on September 19, 1941, in Civil Action No. 5234 petitioner-plaintiff Republic Steel Corporation filed its Motion for New Trial, said Motion for New trial, with affidavit of D. M. Carr attached, being identical with the Motion for New Trial and affidavit of D. M. Carr attached filed by petitioner-plaintiff Tennessee Coal, Iron & Railroad Company heretofore set out.

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622 ORDER OVERRULING PLAINTIFF'S MOTION FOR A JUDGMENT OR DECREE IN ITS FAVOR.

(Civil Action No. 5232.)

This cause coming on to be heard on the motion of plaintiff for a judgment or decree in its favor and against

the defendants, separately and severally, and said motion *having been heard and considered* by the Court,

It Is Ordered, Adjudged and Decreed that said motion, and each separate numbered paragraph thereof, be, and the same hereby is, in all respects overruled, and to the action of the Court, plaintiff duly excepted.

Done this the 3rd day of October, 1941.

T. A. MURPHREE,
United States District Judge.

Filed October 3, 1941, Chas. B. Crow, Clerk.

On October 3, 1941, orders identical with the foregoing were made and filed in Civil Actions Nos. 5233 and 5234.

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623 JUDGMENT AND DECREE OF THE COURT OVERRULING PLAINTIFF'S MOTIONS AND OBJECTIONS.

(Civil Action No. 5232.)

This cause coming on to be heard on the 20th day of October, 1941, on the separate and several hereinafter named motions and objections of the plaintiff, all parties being present in Court by counsel, after argument of counsel, was submitted to and taken under advisement by the Court, and said matters having been fully considered by the Court,

It is Ordered, Adjudged and Decreed:

1. That plaintiff's motions referred to and the objections of the plaintiff to the judgment of the Court as

herein rendered on the 10th day of September, 1941, and each separate and several paragraph of said motion and of said objections be and the same thereby are in all respects overruled.

2. That plaintiff's objections to the conclusions of law filed herein by the Court and each of them separately and severally be and the same hereby are in all respects overruled.

3. That plaintiff's objections to the findings of fact filed by the Court herein and each of them, separately and severally, be and the same hereby are in all respects overruled.

4. That plaintiff's motion to amend the findings of fact filed herein and separately and severally each paragraph thereof be and the same hereby are overruled.

5. And to the action of the Court in each of the matters above set forth, separately and severally, plaintiff in open Court duly excepted.

Done This the 20th day of October, 1941.

T. A. MURPHREE,
United States District Judge.

Filed October 20, 1941. Chas. B. Crow, Clerk, U. S. Dist. Court.

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On October 20, 1941, judgments and decrees in all respects identical with the foregoing were entered in Civil Action No. 5233 and in Civil Action No. 5234, and filed in Court.

625 ORDER OVERRULING MOTION FOR NEW TRIAL.

(Civil Action No. 5232.)

This cause came on to be heard on the 7th day of November, 1941, on plaintiff's motion for a new trial. All parties being present in Court by counsel, and said motion having been duly considered by the Court, and the Court being of the opinion that as a matter of law waiver and estoppel cannot defeat an employee's right to overtime compensation due under Section 7 of the Fair Labor Standards Act of 1938 regardless of what evidence is adduced;

It is Ordered, Adjudged and Decreed that said motion in its entirety be and the same hereby is overruled, to which plaintiff duly excepts.

Done this 8th day of November, 1941.

T. A. MURPHREE,
United States District Judge.

Filed November 8, 1941.

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On November 8, 1941, orders identical with the foregoing were made and filed in Civil Actions Nos. 5233 and 5234.

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626 NOTICE OF APPEAL.

(Civil Action No. 5232.)

Notice is hereby given that the Tennessee Coal, Iron & Railroad Company, a corporation, plaintiff above

named, hereby appeals to the United States Circuit Court of Appeals for the Fifth Circuit from that certain decree or judgment entered in this action on the 10th day of September, 1941, and said plaintiff separately and severally appeals from the following separate and several portions of said judgment:

"2. The working time of the underground ore mining employees of plaintiff, within the meaning of Section 7 of the Fair Labor Standards Act of 1938, includes all time spent by plaintiff's said employees from the time they report at the collar or portal of the mine or mouth of the mine, until they emerge from the collar, portal, or mouth of the mine at the end of the the shift, and includes the aggregate of all time spent by said employees on the surface in obtaining and returning lamps, carbide, and tools and in checking in and out. This time worked does not include any fixed lunch period of one-half hour or more during which said underground ore mining employee is relieved of all duties.

"3. Plaintiff, in not compensating its said underground ore mining employees for all time worked as defined in paragraph 2 hereof in excess of 44 hours weekly between October 24, 1938, and October 23, 1939; in excess of 42 hours weekly between October 24, 1939, and October 23, 1940; and in excess of 40 hours weekly since October 24, 1940, and until May 1, 1941, at a rate not less than one and one-half times the regular rates at which said employees were employed, has violated Section 7 of the Fair Labor Standards Act of 1938.

* * * * * * * * *

"6. Such employees or their personal representatives as have not filed claims are given sixty days from the date hereof in which to file the same.

"7. Jurisdiction of this cause is retained for the purpose of giving full effect to this decree and specifically to adjudge and determine the claims ~~of the~~ employees and their personal representatives for unpaid wages and liquidated damages and to adjudge and to appoint a special master or masters to report thereon and to determine and fix the fee for the attorneys for the defendants herein."

This appeal is taken from the judgment in its entirety, and, separately and severally, from each separate and several part thereof, and separately from the order of the Court entered in this action on the 8th day of November, 1941, overruling plaintiff's motion for a new trial.

This Dec. 5, 1941.

E. L. ALL,
BORDEN BURR,
Attorneys for plaintiff, Tennessee Coal, Iron & Railroad Company, a corp.

Address: Birmingham, Alabama.

Filed December 5, 1941.

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On December 5, 1941, in Civil Action No. 5233 Petitioner-Plaintiff Sloss-Sheffield Steel & Iron Company filed its Notice of Appeal, and on the same date, in Civil Action No. 5234 ~~Plaintiff-Petitioner~~ Republic Steel Corporation filed its Notice of Appeal, both said notices being identical with the foregoing.

(Civil Action No. 5232.)

Know All Men By These Presents: That we, Tennessee Coal, Iron & Railroad Company, a corporation, of Birmingham, Alabama, as Principal; and Borden Burr and A. Benners, of Birmingham, Alabama, as Surety, authorized to become surety upon judicial bonds, are held and firmly bound unto Muscoda Local No. 123, an unincorporated association affiliated with the International Union of Mine, Mill and Smelter Workers, and W. C. Gunnin, Pete Dulaney, R. H. Martin and John Thompson, individually and as officers and members of such Local; and Wenonah Local No. 157, an unincorporated association affiliated with the International Union of Mine, Mill and Smelter Workers, and C. J. McDaniel, W. B. Lemley, R. E. Lemley, and Ward Jefferson, individually and as officers and members of such Local; and Ishkooda Local No. 153, an unincorporated association affiliated with the International Union of Mine, Mill and Smelter Workers, and E. A. Sisemore, L. H. McBrayer, Elmore Mitchell, and Dennis Hart, individually and as officers and members of such Local; and Van D. Jones, C. L. Peques, and Frank Allen, individually and as officers of the International Union of Mine, Mill and Smelter Workers, an unincorporated association, and Muscoda Local No. 21935, Red Ore Miners Union, and unincorporated association affiliated with the American Federation of Labor, and Fred Trammel, Joe P. Bell, W. R. Headrick, and I. V. Robinson, individually and as officers and members of such Local; and Wenonah Local No. 21936, Red Ore Miners Union, and unincorporated association affiliated with the American Federation of Labor, and W. W. Kendrick, G. L. Batson, Will McGhee, and W. T. Maxwell, individually and as officers and members of such Local; and Ishkooda Local

No. 21937, Red Ore Miners Union, an unincorporated association affiliated with the American Federation of Labor, and J. S. Pitts, James A. Bailey, Jr., A. E. Wesley, John White, James Knox, Nathan Smith, and James Snow, individually and as officers and members of such Local; and S. E. Roper and W. O. Hare, individually and as officers and members of the American Federation of Labor, an unincorporated association, and Philip B. Fleming, Administrator of the Wage & Hour Division of the United States Department of Labor, their successors, heirs, or assigns, the above named defendants, in the penal sum of Two Hundred & Fifty & No/100 ($250.00) Dollars, to be paid by the said Tennessee Coal, Iron & Railroad Company, for the payment of which, well and truly to be made, we bind ourselves, our successors and assigns, jointly and severally, by these presents.

The condition of the foregoing obligation is that:

Whereas, The above bounden Tennessee Coal, Iron & Railroad Company, a corporation, of Birmingham, Alabama, the plaintiff in the above styled cause, has prosecuted an appeal to the United States Circuit Court of Appeals for the Fifth Circuit to reverse the decree and judgment entered in the above entitled action by the District Court of the United States for the Northern District of Alabama, Southern Division, made and entered on September 10, 1941, and the order of the Court entered on November 8, 1941, overruling plaintiff's motion for a new trial.

Now, Therefore, if the said Tennessee Coal, Iron & Railroad Company, a corporation, shall prosecute said appeal to effect and pay all the costs, if its appeal is dismissed, the judgment or decree affirmed, or such costs as the Appellate Court may award if the judgment is modi-

fied, then this obligation shall be void; otherwise, to remain in full force and effect.

This Dec. 5, 1941.

TENNESSEE COAL, IRON & RAILROAD COMPANY.
By BORDEN BURR,
Its Attorney,
As Principal,
A. BENNERS and
BORDEN BURR,
As Surety.

Filed December 5, 1941.

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631 APPEAL BOND.

(Civil Action No. 5233.)

Know All Men By These Presents: That we, Sloss-Sheffield Steel & Iron Company, a corporation, of Birmingham, Alabama, as Principal, and E. L. All and W. B. White, of Birmingham, Alabama, as Surety, authorized to become surety upon judicial bonds, are held and firmly bound unto Sloss Red Ore Local No. 109, an unincorporated association affiliated with the International Union of Mine, Mill and Smelter Workers, and John Hill, Jesse Gaines and W. A. O'Neal, individually and as officers and members of such Local; and Ruffner Miners Union No. 512, an unincorporated association affiliated with the International Union of Mine, Mill and Smelter Workers, and Frank Parker, Hosea Bickerstaff, and George T. Drummond, individually and as officers and members of such Local; and Van D. Jones, C. L. Peques and Frank

Allen, individually and as officers of the International Union of Mine, Mill and Smelter Workers, an unincorporated association, and Philip B. Fleming, Administrator of the Wage & Hour Division of the United States Department of Labor, their successors, heirs or assigns, the above named defendants, in the penal sum of Two Hundred & Fifty & No/100 ($250.00) Dollars, to be paid by the said Sloss-Sheffield Steel & Iron Company, for the payment of which, well and truly to be made, we bind ourselves, our successors and assigns, jointly and severally by these presents.

The condition of the foregoing obligation is that:

Whereas, the above bounden Sloss-Sheffield Steel & Iron Company, a corporation, of Birmingham, Alabama, the plaintiff in the above styled cause, has prosecuted an appeal to the United States Circuit Court of Appeals for the Fifth Circuit to reverse the decree and judgment entered in the above entitled action by the District Court of the United States for the Northern District of Alabama, Southern Division, made and entered on September 10, 1941, and the order of the Court entered on November 8, 1941, overruling plaintiff's motion for a new trial.

Now, Therefore, If the said Sloss-Sheffield Steel & Iron Company, a corporation, shall prosecute said appeal to effect and pay all the costs, if its appeal is dismissed, the judgment or decree affirmed, or such costs as the Appellate Court may award if the judgment is modified, then this obligation shall be void; otherwise, to remain in full force and effect.

Dated this 5th day of December, 1941.

SLOSS-SHEFFIELD STEEL & IRON COMPANY,
By E. L. ALL,
Its Attorney, as Principal,
E. L. ALL,
and
W. B. WHITE,
As Sureties.

Filed December 5, 1941.

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633 APPEAL BOND.

(Civil Action No. 5234.)

Know All Men By These Presents: That we, Republic Steel Corporation, a corporation, of Birmingham, Alabama, as Principal, and Border. Burr and A. Benners, of Birmingham, Ala., as Surety, authorized to become surety upon judicial bonds, are held and firmly bound unto Raimund Local 121, an unincorporated association affiliated with the International Union of Mine, Mill and Smelter Workers, and John Butler, Lewis Tarrant, and B. G. Stephens, individually and as officers and members of such Local, and Van D. Jones, C. L. Pegues, and Frank Allen, individually and as officers of the International Union of Mine, Mill & Smelter Workers, an unincorporated association, and Unit No. 8, Brotherhood of Miners of Captive Ore Mines of Alabama, an unincorporated association not affiliated with any labor organization, and Melvin Lawrence, C. W. Eady and J. E. Thornton, indivdiually and as officers and members of said Unit, and Philip B. Fleming, Administrator of the Wage and Hour Division of the United States Department of Labor, their

successors, heirs or assigns, the above named defendants in the penal sum of two hundred & fifty Dollars to be paid by the said Republic Steel Corporation, for the payment of which, well and truly to be made, we bind ourselves, our successors and assigns, jointly and severally, by these presents.

The condition of the foregoing obligation is that:

Whereas, The above bounden Republic Steel Corporation, a corporation, of Birmingham, Alabama, the plaintiff in the above styled cause, has prosecuted an apepal to the United States Circuit Court of Appeals for the Fifth Circuit, to reverse the decree and judgment entered in the above entitled action by the District Court of the United States for the Northern District of Alabama, Southern Division, made and entered on September 10, 1941, and the order of the Court entered on November 8, 1941, overruling plaintiff's motion for a new trial.

Now, Therefore, If the said Republic Steel Corporation, a corporation, shall prosecute said appeal to effect and pay all the costs, if its appeal is dismissed, the judgment or decree affirmed, or such costs as the Appellate Court may award if the judgment is modified, then this obligation shall be void; otherwise to remain in full force and effect.

This Dec. 5, 1941.

REPUBLIC STEEL CORPORATION.
By BORDEN BURR,
Its Attorney and Agent,
As Principal,
A. BENNERS,
BORDEN BURR,
As Surety.

Filed December 5, 1941.

635 CONCISE STATEMENT OF THE POINTS ON WHICH APPELLANTS INTEND TO RELY ON THE APPEAL.

(Civil Actions Nos. 5232, 5233 & 5234.)

Appellants, separately and severally, set out and make a part of their designation of the contents of the record on appeal the following separate and several points on which they intend to rely on appeal, and they will assert that the District Court of the United States for the Southern Division of the Northern District of Alabama erred in its several orders, rulings, and judgments upon the trial of said cause in the following, among other, separate and several respects:

1. The Court erred in rendering the judgment entered on September 10, 1941, and in entering and rendering those separate and several portions thereof identified as paragraphs numbered 2, 3, 4, 5, 6, and 7.

2. The Court erred in refusing to find the several facts contained in Plaintiff's Requests for Findings of Fact separately and severally as to each fact set forth in each numbered request.

3. The Court erred in refusing to grant the plaintiff's Requests for the Entry of Conclusions of Law separately and severally as to each conclusion set forth in each numbered request.

4. The Court erred in finding the facts or statements treated as facts contained in each of the following numbered paragraphs of its Findings of Fact entered on September 10, 1941, to-wit: 5, and 8 to 28, both inclusive. The plaintiff will urge error in respect of each of the

facts or statements treated as facts above designated and set forth separately and severally, that the same should not have been found or stated as a fact by the Court, on all grounds available to the plaintiff, including the claim that the same should not have been so found or stated on one or more of two or more of the following grounds, to-wit: (a) It was irrelevant, incompetent or immaterial; (b) it constituted a conclusion of law; (c) it constituted an ultimate finding of fact; (d) it was not supported by any evidence; (e) it was not supported by any legal evidence; (f) it was against the weight of the evidence; (g) it was against the great weight of the evidence; (h) it involved a mixed question of law and fact; (i) it was misleading; (j) it was partial or incomplete; (k) it was not supported by the evidentiary facts found, or any of them.

5. The Court erred in its conclusions of law, separately and severally as to each conclusion.

6. The Court erred in declaring in its judicial construction of the Fair Labor Standards Act of 1938 and Section 7 thereof that:

"2. The working time of the underground ore mining employees of plaintiff, within the meaning of Section 7 of the Fair Labor Standards Act of 1938, includes all time spent by plaintiff's said employees from the time they report at the collar or portal of the mine or mouth of the mine, until they emerge from the collar, portal, or mouth of the mine at the end of the shift, and includes the aggregate of all time spent by said employees on the surface in obtaining and returning lamps, carbide, and tools and in checking in and out. This time worked does not include any fixed lunch period of one-half hour or more during which said underground ore mining employee is relieved of all duties."

7. The Court erred in incorporating in its decree construing the Fair Labor Standards Act of 1938, and Section 7 thereof the following:

"3. Plaintiff, in not compensating its said underground ore mining employees for all time worked as defined in paragraph 2 hereof in excess of 44 hours weekly between October 24, 1938, and October 23, 1939; in excess of 42 hours weekly between October 24, 1939, and October 23, 1940; and in excess of 40 hours weekly since October 24, 1940, and until May 1, 1941, at a rate not less than one and one-half times the regular rates at which said employees were employed, has violated Section 7 of the Fair Labor Standards Act of 1938."

8. The Court erred in incorporating in its decree construing the Fair Labor Standards Act of 1938 and Section 7 thereof the following:

"6. Such employees or their personal representatives as have not filed claims are given sixty days from the date hereof in which to file the same."

9. The Court erred in incorporating in its decree construing the Fair Labor Standards Act of 1938 and Section 7 thereof the following:

"7. Jurisdiction of this cause is retained for the purpose of giving full effect to this decree specifically to adjudge and determine the claims of the employees and their personal representatives for unpaid wages and liquidated damages and to adjudge and to appoint a special master or masters to report thereon and to determine and fix the fee for the attorneys for the defendants herein."

10. The Court adjudicated and determined matters as to which appellants have never had their day in Court.

and matters which by express agreement and understanding had between all the parties and the Court, were not to be considered and with respect to which evidence was not to be introduced on the trial heretofore had.

11. The Court adjudicated matters in its decrees dated September 10, and November 8, 1941, which the parties in the pretrial agreement dated May 22, 1941, stipulated were not to be considered on the trial heretofore had.

12. The Court erred in overruling Appellant's motion for a new trial.

13. The Court erred in its order entered on November 8, 1941, in ruling that:

"—The Court being of the opinion that as a matter of law waiver and estoppel cannot defeat an employee's overtime right to compensation due under Section 7 of the Fair Labor Standards Act of 1938, regardless of what evidence is adduced;

"It is Ordered, Adjudged and Decreed that said motion in its entirety be and the same hereby is overruled—."

14. Appellants will assert that the Court, in those portions of its order entered on September 10, 1941, quoted in paragraphs number 7 and 9 hereof, determined that the appellants could have no defense in bar to the claims asserted by the Appellees without affording appellants any opportunity at any time either to present such defenses as they may have thereto. Appellants will further assert that the Court, in entering the above quoted portions of its order of November 8, 1941, erroneously assumed that the only defenses open to appellants were waiver and estoppel, and determined that such defenses

should be decided adversely to appellants as a matter of law notwithstanding the Court had before it neither the law nor the facts relating thereto.

15. The Court erred in entering its judgment dated September 10, 1941, and its order dated November 8, 1941, in that said judgment and said order adjudicated the appellees' right to recover of the appellants, although there were on file before the Court motions to dismiss and answers to all counter-claims filed by appellees, which said answers and motions to dismiss had not either prior to or since the entry of the judgment dated September 10, 1941, and the order dated November 8, 1941, been ruled upon or otherwise disposed of.

16. The Court erred in refusing to allow appellants to prove the conditions that existed in the underground bituminous coal mines in the State of Alabama prior to October 24, 1938.

17. The Court erred in refusing to allow appellants to prove the conditions that existed in the underground bituminous coal mines in the United States prior to October 24, 1938.

18. The Court erred in refusing to allow appellants to prove the conditions that existed in the underground anthracite coal mines in the United States prior to October 24, 1938.

19. The Court erred in sustaining appellees' objections to evidence offered by appellants showing the conditions that existed in the underground bituminous coal mines in the State of Alabama prior to October 24, 1938.

20. The Court erred in sustaining appellees' objections to evidence offered by appellants showing the conditions

that existed in the underground bituminous coal mines in the United States prior to October 24, 1938.

21. The Court erred in sustaining appellees' objections to evidence offered by appellants showing the conditions that existed in the underground anthracite coal mines in the United States prior to October 24, 1938.

22. The Court erred in refusing to allow appellants to prove that, prior to October 24, 1938, in the underground bituminous coal mines in the State of Alabama, it had been the universal custom to pay the underground coal mining employees compensation only for the time spent by them at their usual working places and to exclude as noncompensable all time spent by them in being transported or in walking to and from their usual working places.

23. The Court erred in refusing to allow appellants to prove that, prior to October 24, 1938, in the underground bituminous coal mines in the United States, it had been the universal custom to pay the underground coal mining employees compensation only for the time spent by them at their usual working places and to exclude as noncompensable all time spent by them in being transported or in walking to and from their usual working places.

24. The Court erred in refusing to allow appellants to prove that, prior to October 24, 1938, in the underground anthracite coal mines in the United States, it has been the universal custom to pay the underground coal mining employees compensation only for the time spent by them at their usual working places and to exclude as noncompensable all time spent by them in being transported or in walking to and from their usual working places.

25. The Court erred in refusing to allow appellants to prove that for many years prior to October 24, 1938, by written contract between the operators of underground bituminous coal mines in the State of Alabama and their underground employees, it had been stipulated that the day's work of the underground employee should be computed and paid on the basis of the time that he had actually spent at his usual working place, and that all time spent in being transported or in walking to and from such working place had been excluded as non-compensable.

26. The Court erred in refusing to allow appellants to prove that for many years prior to October 24, 1938, by written contract between the operators of underground bituminous and anthracite coal mines in the United States and their underground employees, it had been stipulated that the day's work of the underground employees should be computed and paid on the basis of the time that he had actually spent at his usual working place, and excluding the time spent in being transported or in walking to and from such working place.

27. The Court erred in refusing to allow appellants to prove that prior to October 24, 1938, in the open pit iron ore mines, it had been the universal custom to compensate and pay the miners on the basis of the time actually spent by them at their usual working places, exclusive of the time spent by them in being transported or in walking to and from such working places.

28. Appellants will assert and will rely on the appeal on their contention that in order to reach a proper interpretation of Section 7 of the Act the Court should have received in evidence and considered as evidence the fact that: (a) In all of the bituminous underground coal mines

in the State of Alabama; (b) all of the bituminous underground coal mines of the United States of America; (c) all of the underground anthracite coal mines in the United States of America; and (d) all of the open pit iron ore mining operations in the United States of America, it had been the universal and traditional custom and had been stipulated in written contracts executed between the operations of such mines and their employees or the duly authorized representatives of such employees that the day's work of the underground employees should be computed and paid on the basis of the time actually spent by them in their usual working places, exclusive of the time spent in traveling to and from such working places.

29. The Court erred in sustaining appellees' objections to and in refusing to admit in evidence those documents designated as plaintiff's Exhibits numbered 4-B, 4-C, 6 and 48, which said documents constitute interpretations made by the Wage and Hour Division of the United States Department of Labor, or by the Administrator thereof, of Section 7 of the Fair Labor Standards Act of 1938.

30. The Court erred in sustaining appellees' objections to and in refusing to admit in evidence those documents designated as plaintiff's Exhibits 16, 19, 21 and 45, which said documents established administrative constructions of law substantially similar to import, insofar as "work week" or "work day" is concerned, to Section 7 of the Fair Labor Standards Act of 1938.

31. The Court erred in sustaining appellees' objections to and in refusing to admit in evidence official publications of various Departments of the United States Government designated as plaintiff's Exhibits numbered 12,

13 and 13-A, said publications relating to the bituminous and anthracite coal industries in the United States.

32. The Court erred in sustaining appellees' objections to and refusing to admit in evidence those documents designated as plaintiff's Exhibit 14, 31, 32 and 46, constituting administrative determinations of the work day in bituminous and anthracite coal industries in the United States.

33. The Court erred in sustaining objections to and in refusing to admit in evidence the depositions, with exhibits thereto, of W. J. Jenkins, L. C. Gunter, Francis J. Keegan, and D. C. Kennedy, designated respectively as plaintiff's Exhibits 26, 27, 28 and 29.

34. The Court erred in sustaining appellees' objections to and in refusing to admit in evidence a document designated as plaintiff's Exhibit 25, constituting a formal communication addressed to Colonel Philip B. Fleming, as Administrator of the Wage and Hour Division of the United States Department of Labor, by a committee representing coal operators and the United Mine Workers of America.

35. The Court erred in sustaining appellees' objections to and in refusing to admit in evidence certain contracts had between coal operators and organizations representing their employees, and certain other documents relating to coal mining operations in Alabama and in the United States, designated as Plaintiff's Exhibits 30, 33, 34 and 47, Republic Exhibits 17, 18, 19, Sloss Exhibits 38, 39, 40, 41 and 42.

36. The Court erred in sustaining appellees' objections to and in refusing to admit in evidence certain maps de-

picting open pit iron ore mining operations, designated as Plaintiff's Exhibits 40, 41, 42 and 43.

37. The Court erred in sustaining appellees' objections to and in refusing to admit data concerning lost-time accidents in the coal mines of appellant Tennessee Coal, Iron & Railroad Company, and in the coal mines of the United States as a whole, designated as T. C. I. Exhibit 40 and plaintiff's Exhibit 52.

38. The Court erred in overruling appellant's objections to and allowing the introduction in evidence of certain copies of a publication entitled the "Ore Miners" offered by appellees designated as defendants' Exhibits 5, 6, and 13 through 18, both inclusive.

39. The Court erred in overruling appellants' objections to and allowing the introduction in evidence of testimony offered by appellees relating to the personal hazards suffered by the appellants' underground iron ore mining employees while being transported and walking to and from their usual working places.

40. The Court erred in overruling appellants' objections to and allowing the introduction in evidence of testimony offered by appellees relating to the personal discomfort experienced by the appellants' iron ore mining employees while being transported and walking to and from their usual working places.

41. The Court erred in construing the term "work-week" as used in Section 7 of the Fair Labor Standards Act of 1938 so as to include travel time, as such, consumed by the appellants' underground iron ore mining employees in going to and returning from their usual working places.

42. The term "workweek" as used in Section 7 of the Fair Labor Standards Act of 1938 does not include travel time, as such, consumed by the appellants' underground iron ore mining employees in going to and returning from their usual working places.

43. The Court erred in holding that travel time, as such, consumed by the underground iron ore mining employees of appellants' in going to and from their usual working places, is to be included in their workweek under the Fair Labor Standards Act of 1938.

44. Travel time, as such, consumed by the underground iron ore mining employees of appellants in going to and from their usual working places is not properly to be included in their workweek under the Fair Labor Standards Act of 1938.

45. The Court erred in construing Section 7 of the Fair Labor Standards Act of 1938 to include within the term "workweek" all the time spent by all appellants' underground iron ore mining employees in being transported and in walking to and from their usual working places.

46. By long established custom and practice and by contract between employer and employees for years before and continuously up to October 24, 1938, "work time" of underground employees in all iron ore mines in Alabama was considered as, and compensated for, on the basis of work performed at the usual working places, exclusive of time consumed in going to and from the working places.

47. By long established custom and practice and by contract between employer and employee for years before and continuously up to October 24, 1938, "work time" of

underground employees in all iron ore mines in the United States was considered as, and compensated for, on the basis of work performed at the usual working places, exclusive of time consumed in going to and from the working places.

E. L. ALL,
BORDEN BURR,
Attorneys for Appellants.

A copy of the foregoing statement of the points on which appellants intend to rely on the appeal has been served on Messrs. Crampton Harris, J. Q. Smith, Ralph Quinn, W. F. Spencer and Jerome A. Cooper, Attorneys of Record for those unions and employees affiliated with the International Union of Mine, Mill and Smelter Workers, with the Red Ore Mines Union of the A. F. of L., and for the intervener, respectively.

BORDEN BURR,
Of Counsel for Appellants.

Filed January 14, 1942.

In the District Court of the United States for the Southern Division of the Northern District of Alabama.

Tennessee Coal, Iron & Railroad Company, a Corporation, Petitioner and Plaintiff
vs. Civil Action No. 5232.
Muscoda Local No. 123, Etc., et al, Defendants.

Sloss-Sheffield Steel & Iron Company, a Corporation, Petitioner and Plaintiff
vs. Civil Action No. 5233.
Sloss Red Ore Local No. 109, Etc., et al, Defendants.

Republic Steel Corporation, a Corporation, Petitioner and Plaintiff
vs. Civil Action No. 5234.
Raimund Local No. 121, Etc., et al, Defendants.

It Is Stipulated between the parties hereto that the record as certified by the clerk of the District Court to the Clerk of the Circuit Court of Appeals, and the record as printed under the direction of the Clerk of the Circuit Court of Appeals, and in the event an appeal from the Circuit Court of Appeals, or petition for writ of certiorari, to the Supreme Court of the United States be granted, shall contain the following changes, modifications or abridgements:

(a) On June 3, 1941. defendants affiliated with International Union of Mine, Mill and Smelter Workers filed their "Amendments to Answer of Defendants Affiliated with International Union of Mine, Mill and Smelter Workers," which amendment contained approximately 1800 names of individual who were intervening as parties

defendants, and it is stipulated that in order to obviate the printing of the 1800 names, the following, being the full text of the amendment with the exception of said 1800 names, shall be certified by the Clerk of the District Court to the Clerk of the Circuit Court of Appeals and printed in the record:

Amendments to Answer of Defendants Affiliated with International Union of Mine, Mill and Smelter Workers.

(Civil Action No. 5232.)

Now come the defendants, Muscoda Local No. 123, an unincorporated association affiliated with the International Union of Mine, Mill and Smelter Workers, and W. C. Gunning, Pete Dulaney, R. H. Martin and Johnson Thompson, individually and as officers and members of such Local; and Wenonah Local No. 157, an unincorporated association affiliated with the International Union of Mine, Mill and Smelter Workers, and C. J. McDaniel, W. B. Lemley, R. E. Lemley and Ward Jefferson, individually and as officers and members of such Local; and Ishkooda Local No. 153, an unincorporated association affiliated with the International Union of Mine, Mill and Smelter Workers, and E. A. Sisemore, L. H. McBrayer, Elmore Mitchell, and Dennis Hart, individually and as officers and members of such Local, and Van D. Jones, C. L. Pegues, and Frank Allen, individually and as officers of the International Union of Mine, Mill and Smelter Workers, an unincorporated association, and pursuant to the stipulation reached at the pretrial hearing of the above entitled cause, amend their answer heretofore filed herein by adding the following additional averments:

XII.

For a further separate defense, these defendants allege that under the Fair Labor Standards Act of 1938 the workweek for the employees of the plaintiff engaged in production of goods for commerce includes all the time when a miner reports for duty as required at or near the collar or portal of the mine and ends when such miner reaches the collar or portal of the mine at the end of the shift, and all of the time spent on the surface in obtaining and returning lamps, carbide and tools, and checking in and out.

XIII

As a further separate defense, these defendants assert a counter-claim against the plaintiff for unpaid overtime compensation and an additional equal amount of liquidated damages pursuant to section 16. (b) of the Fair Labor Standards Act of 1938. In support of this counter-claim the defendants allege:

(a) That since the effective date of the said Act and until on or about May 1st, 1941, the plaintiff has never compensated any of its employees engaged in the production of goods for commerce within the meaning of said Act for any of the time spent by said employees in traveling to and from the collar or portal of the mine at the beginning and end of the shift and for any of the time spent by said employees on the surface in obtaining and returning lamps, carbide and tools and checking in and out.

(b) That since the effective date of the Act and until on or about May 1st, 1941, by reason of the failure of the plaintiff to compute said time in the work-week of

its employees engaged in production for commerce within the meaning of said Act, the plaintiff has employed said employees for work weeks longer than forty-four (44) hours from October 24th, 1938, to October 24th, 1939, forty-two (42) hours from October 24th, 1939, to October 24th, 1940, and forty (40) hours from October 24th, 1940 to on or about May 1st, 1941.

(c) That these defendants bring this counter-claim as agents and representatives of the employees of the plaintiff affected pursuant to section 16 (b) of the said Act and pursuant to Rule 23 (2) of the Rules of Civil Procedure of the District Courts of the United States, in behalf of their members and all other employees similarly situated of the plaintiff who may now or hereafter during the pendency of this suit designate these defendants as their agents and representatives for the purpose of this suit, and these defendants specifically file counter-claims for and in behalf of each of the following named employees of complainant, separately and severally, to wit:

Agee, Frank; Ashley, Horace C.; Allison, Toll; (and approximately 1800 others).

(d) These defendants do claim for each of the individuals hereinabove named a total of work hours for which such individual counter-claimant has not been paid, in the number of, to-wit: thirteen hundred and ten (1310) hours, being ten (10) hours a week for one hundred and thirty-one (131) weeks, at the maximum rate of 87-½ cents an hour, making a total sum of, to-wit: eleven hundred and forty-six dollars and twenty-five cents ($1,146.25), as the unpaid wage items of each counter-claimant, and in addition thereto, claims for each an equal amount as liquidated damages, as provided by the Fair Labor Standards Act of 1938; and in addition, does claim

an attorney's fee, to be ascertained and fixed by this Honorable Court. In making this counter-claim for the maximum number of hours and the maximum rate of pay, these defendants inform the Court that if an excessive amount is claimed hereby the exact amount can be readily determined in appropriate proceedings under the direction of this Court, and calls the attention of the Court to the order on pre-trial hearing entered herein, which provides in paragraph 2(b) that in such determination "the parties shall have the right and opportunity of presenting for the Court's consideration all of their respective claims, representatives and defenses."

Wherefore, the premises considered, these defendants pray that the Court take jurisdiction of these counter-claims and hear and adjudicate the same and that on the final hearing, will dissolve the temporary injunction heretofore issued and will dismiss the bill of complaint at the cost of the plaintiff.

These defendants further pray that judgment be awarded to the defendants as agents and representatives of the employees of the plaintiff hereinabove named for the unpaid overtime compensation due each of said employees and for an additional equal amount as liquidated damages to each of them, together with costs, and that the Court allow a reasonable attorney's fee to be paid by the plaintiff to Harris & Brown, a law firm composed of Crampton Harris and George S. Brown, and J. A. Lipscomb, the attorneys for the defendants.

(b) On June 3, 1941, all defendants in Civil Action No. 5233, Sloss-Sheffield Steel & Iron Company v. Sloss Red Ore Local No. 109, Etc., filed their "Amendments to Answer of all Defendants," which amendment contained the names of approximately 575 individuals who were in-

tervening as parties defendants in said cause, and which amendment, except for the preamble and said names was in all respects identical with the amendments filed in Civil Action No. 5232, and set out in (a) of this Stipulation, and in order to obviate the printing of said names, and duplication of the same text in the record, it is stipulated that the following concerning said amendments shall be certified by the Clerk of the District Court to the Clerk of the Circuit Court of Appeals and printed in the record:

Amendments to Answer of All Defendants.

(Civil Action No. 5233.)

Now comes the defendants and pursuant to the stipulation reached at the pretrial hearing of the above entitled cause, amend their answers heretofore filed herein by adding the following additional averments:

(The remainder of said Amendments is identical with the Amendments in Case No. 5232, set out in (a) of this stipulation, except that the names of interveners are as follows: Ashworth, J. L.; Artis, David; Allen, Sam; Anderson, Thad, and approximately 575 others.)

(c) On June 3, 1941, in Civil Action No. 5234,—Republic Steel Corporation v. Raimund Local No. 121, etc.,—the defendants affiliated with International Union of Mine, Mill and Smelter Workers filed their "Amendments to Answer of Defendants Affiliated with International Union of Mine, Mill and Smelter Workers," which amendments contained the names of approximately 505 individuals who were intervening as parties defendants in said cause, and which amendments, except for the preamble and said names, were in all respects identical with the amend-

ments filed in Civil Action No. 5232, and set out in (a) of this Stipulation, and in order to obviate the printing of said names, and duplication of the same text in the record, it is stipulated that the following concerning said amendments shall be certified by the Clerk of the District Court to the Clerk of the Circuit Court of Appeals and printed in the record:

Amendments to Answer of Defendants Affiliated with International Union of Mine, Mill and Smelter Workers.

(Civil Action No. 5234.)

Now come the defendants, Raimund Local 121, an unincorporated association affiliated with the International Union of Mine, Mill & Smelter Workers, and John Butler, Lewis Tarrant and B. G. Stephens, individually and as officers and members of such Local, and Van D. Jones, C. L. Pegues and Frank Allen, individually, and as officers of the International Union of Mine, Mill & Smelter Workers, an unincorporated association, and pursuant to the stipulation reached at the pretrial hearing of the above entitled cause, amend their answer heretofore filed herein by adding the following additional averments:

(The remainder of said Amendments is identical with the Amendments in Case No. 5232, set out in (a) of this stipulation, except that the names of interveners are as follows: Anderson, Hubert Lavell; Atkinson, James Edward, and approximately 505 others.)

(d) With reference to additional amendments to answers filed by the defendants adding additional parties claimant, it is stipulated that the following shall be certi-

fied by the Clerk of the District Court to the Clerk of the Circuit Court of Appeals and printed in the record:

Additional Amendments to Answers of Defendants.

Amendments to answers of defendants which added additional claimants, and entered appearances as additional attorneys for defendants affiliated with International Union of Mine, Mill and Smelter Workers Lee Pressman and Joe Kovner of Washington, D. C., were made as follows:

In case No. 5234,—Republic Steel Corporation v. Raimund Local No. 121, Etc.,—filed July 31, 1941, adding 16 additional claimants, and in the same case, amendment filed October 6, 1941, adding 113 additional claimants; in the same case amendment filed October 8, 1941, adding as additional parties claimant widows, heirs at law, and administrators of twelve deceased employees.

In case No. 5233,—Sloss-Sheffield Steel & Iron Company v. Sloss Red Ore Local No. 109, Etc.,—amendment to answer filed July 31, 1941, adding seven additional claimants; amendment to answer filed October 6, 1941, adding 9 additional claimants; amendment to answer filed October 8, 1941, adding as additional parties claimant widows, heirs at law and administrators of six deceased employees.

In case No. 5232,—Tennessee Coal, Iron & Railroad Company vs. Muscoda Local No. 123, Etc.,—amendment to answer of defendants affiliated with American Federation of Labor filed September 10, 1941, adding 556 additional claimants; amendment to answer of defendants affiliated with International Union of Mine, Mill & Smelter Workers, filed October 6, 1941, adding 85 additional claim-

ants; amendment to answer of defendants affiliated with International Union of Mine, Mill and Smelter Workers, filed October 8, 1941, adding as additional parties claimant widows, heirs at law and administrators of 38 deceased employees.

The plaintiffs, within twenty days from the time of the filing of such amendments, filed as to each of them their motions to dismiss the counterclaims as amended, assigning as grounds for such motions the same grounds assigned, separately and severally, from I to V, both inclusive, as filed to said amendments to cross claims filed June 19, 1941.

It is further stipulated that all amendments to the complaints of the plaintiffs, and amendments to the answer and counterclaims of defendants, shall be considered as having been made within the time allowed for pleading, and each responsive pleading, wherever necessary, shall be considered as having been refiled when amendments to the various pleadings have been made.

(e) With reference to "Plaintiff's Objections to Finding of Facts and Motion for Amendment thereof," filed by Plaintiff Sloss-Sheffield Steel & Iron Company in Case No. 5233, and by Republic Steel Corporation in Case No. 5234, it is stipulated that the Clerk of the District Court shall certify to the Clerk of the Circuit Court of Appeals, and there shall be printed in the record the following:

Plaintiffs' Objections to Findings of Fact and Motion for Amendment Thereof.

(Civil Action Nos. 5233 and 5234.)

On September 19, 1941, Petitioner-Plaintiff Sloss-Sheffield Steel & Iron Company, in Civil Action No. 5233,

filed "Plaintiff's Objections to Findings of Fact and Motion for Amendment Thereof," and on the same date Petitioner-Plaintiff Republic Steel Corporation, in Civil Action No. 5234, filed "Plaintiff's Objections to Findings of Fact and Motion for Amendment thereof," grounds 1 to 10 of each of said objections and motions being identical with grounds 1 to 10, both inclusive of "Plaintiff's Objections to Findings of Fact and Motion for Amendment thereof," filed in Civil Action No. 5232 by Petitioner-Plaintiff Tennessee Coal, Iron & Railroad Company set out at Record p. 556 to 604.

Grounds 11 and 12 filed by Petitioner-Plaintiff Sloss-Sheffield Steel & Iron Company are as follows:

"11. The findings of fact relate to all plaintiff's underground ore mining employees in all plaintiff's underground ore mines and such findings of fact are not applicable under the pleadings and proof to the underground ore mining employees at Plaintiff's No. 1 Iron ore mine.

"12. The findings of fact relate to all plaintiff's underground ore mining employees in all plaintiff's underground ore mines and such findings of fact are not applicable under the pleadings and proof to the underground ore mining employees at plaintiff's Ruffner Iron ore mine."

Grounds 11 and 12 filed by Petitioner-Plaintiff Sloss-Sheffield Steel & Iron Company are as follows:

"1. The findings of fact relate to all plaintiff's underground ore mining employees in all plaintiff's underground ore mines and such findings of fact are not applicable under the pleadings and proof to the underground Ore Mining employees at plaintiff's Raimund Iron Ore Mine.

"12. The findings of fact relate to all plaintiff's underground ore mining employes in all plaintiff's underground ore mines and such findings of fact are not applicable under the pleadings and proof to the underground ore mining employes at plaintiff's Spaulding Iron Ore Mine."

Grounds 13 to 38, both inclusive, filed by Petitioner-Plaintiffs Sloss-Sheffield Steel & Iron Company and Republic Steel Corporation, are identical with grounds 19 to 44, both inclusive, filed by Petitioner-Plaintiff Tennessee Coal, Iron & Railroad Company, set out at Record P. 579 to 630.

Ground 39, filed by Petitioners-Plaintiffs Sloss-Sheffield Steel & Iron Company and Republic Steel Corporation is as follows:

"39. Prior to the enactment of the Fair Labor Standards Act of 1938, plaintiff's underground iron ore mining employees never made any effort to obtain compensation for all of the travelling time spent by them daily after reporting at the mouth of the mine until they left the mouth of the mine at the end of the workday, and during such time and with such knowledge, signed either twice a month or four times a month written receipts acknowledging payment in full for all compensation due to them from the plaintiff."

Grounds 40, 41 and 42 filed by Petitioners-Plaintiffs Sloss-Sheffield Steel & Iron Company and Republic Steel Corporation are identical with grounds 46, 47 and 48, filed by Petitioner-Plaintiff Tennesse Coal, Iron & Railroad Company set out at Record p. 579 to 630.

Ground 43 filed by Petitioners-Plaintiff Sloss-Sheffield Steel & Iron Company and Republic Steel Corporation

is identical with ground 49 filed by Petitioner-Plaintiff Tennessee Coal, Iron & Railroad Company, set out at Record p. 579 to 630 except that the last paragraph of said ground filed by Sloss-Sheffield Steel & Iron Company and Republic Steel Corporation is as follows:

"The efforts set out and described above are the only efforts ever made by said employees relating to the question of receiving compensation for any part of the time expended daily by them in travelling after reporting at the mouth of the mine until they left the mouth of the mine at the end of the workday."

Grounds 44 to 50 both inclusive, filed by Petitioners-Plaintiffs Sloss-Sheffield Steel & Iron Company and Republic Steel Corporation are identical with grounds 50 to 56, both inclusive, filed by Petitioner-Plaintiff Tennessee Coal, Iron and Railroad Company, set out at record p. 579 to 630.

Grounds 51 and 52 filed by Petitioners-Plaintiffs Sloss-Sheffield Steel & Iron Company and Republic Steel Corporation are as follows:

"51. During the period of the pendency of each of the written contracts as described in the above numbered findings from 47 through 50, inclusive, the Tennessee Coal, Iron & Railroad Company, Sloss-Sheffield Steel & Iron Company, and Woodward Iron Company, respectively, and their respective employees, operated under the respective contracts in regard to wages, hours of service, and conditions of employment.

"52. The words, "The eight-hour day means eight hours of work in and about the mines at the usual working places for all classes of labor," as they appear in the con-

tracts described in the above findings from 47 through 50, inclusive, were at all times understood by the contracting parties to mean that the underground iron ore mining employes should not receive any compensation for any of the time expended daily by them in traveling after reporting at the mouth of the mine until they left the mouth of the mine at the end of the workday."

Grounds 53 to 71, both inclusive, filed by Petitioners-Plaintiffs' Sloss-Sheffield Steel & Iron Company and Republic Steel Corporation are identical with grounds 59 to 77, both inclusive, filed by Petitioner-Plaintiff Tennessee Coal, Iron and Railroad Company, set out at record p. 579 to 630.

Grounds 72, 73 and 74 filed by Petitioner-Plaintiff Republic Steel Corporation were as follows:

"72. During the period of time between October 24, 1938, and May 1, 1941, the Tennessee Coal, Iron & Railroad Company had in its job classification of underground ore mining employees approximately 44 different occupations.

"73. During the period of time between October 24, 1938, and May 1, 1941, the Republic Steel Corporation had in its job classification of underground ore mining employees approximately 51 different occupations at its Raimund Mine and approximately 32 different occupations at its Spaulding Mine.

"74. The conditions found in Finding of Fact Numbers 15 to 27, inclusive, as relating to and covering the period between October 24, 1938, and May 1, 1941, existed in all substantial effect during the approximately sixty-year history of iron ore mining in the Birmingham, Alabama, District."

There were no grounds numbered 72, 73 and 74 filed by Petitioner-Plaintiff Sloss-Sheffield Steel & Iron Company.

Grounds 75 to 94, inclusive, filed by Petitioners-Plaintiffs Sloss-Sheffield Steel & Iron Company and Republic Steel Corporation are identical with grounds 81 to 100, both inclusive, filed by Petitioner-Plaintiff Tennessee Coal, Iron and Railroad Company, set out at record 579 to 630.

(f) With reference to "Objections to Conclusions of Law" filed by Plaintiff Sloss-Sheffield Steel & Iron Company in Case No. 5233, and by Republic Steel Corporation in Case No. 5234, it is stipulated that the Clerk of the District Court shall certify to the Clerk of the Circuit Court of Appeals, and there shall be printed in the record the following:

Objections to Conclusions of Law.

(Civil Actions Nos. 5233 and 5234.)

On September 19, 1941, Petitioner-Plaintiff Sloss-Sheffield Steel & Iron Company, in Civil Action No. 5233, filed "Objections to Conclusions of Law" and on the same date Petitioner-Plaintiff Republic Steel Corporation, in Civil Action No. 5234 filed "Objections to Conclusions of Law," grounds 1 to 6 of each of said objections being identical with grounds 1 to 6 of "Objections to Conclusions of Law" filed in Civil Action No. 5232 by Petitioner-Plaintiff Tennessee Coal, Iron & Railroad Company, set out at Record P. 631 to 637.

Grounds 7 and 8 in said "Objections to Conclusions of Law" filed by Petitioner-Plaintiff Sloss-Sheffield Steel & Iron Company are as follows:

"7. The conclusions of law relate to all plaintiff's underground ore mining employees in all plaintiff's underground ore mines, and such conclusions of law are not applicable under the pleadings and proof to the underground ore mining employees at plaintiff's Ruffner iron ore mine.

"8. The conclusions of law relate to all plaintiff's underground ore mining employees in all plaintiff's underground ore mines and such conclusions of law are not applicable under the pleadings and proof to the underground ore mining employees at plaintiff's Sloss No. 1 iron ore mine."

Grounds 7 and 8 in said "Objections to Conclusions of Law" filed by Petitioner-Plaintiff Republic Steel Corporation are as follows:

"7. The conclusions of law relate to all plaintiff's underground ore mining employees in all plaintiff's underground ore mines, and such conclusions of law are not applicable under the pleadings and proof to the underground ore mining employees at plaintiff's Raimund iron ore mine.

"8. The conclusions of law relate to all plaintiff's underground ore mining employees in all plaintiff's underground ore mines and such conclusions of law are not applicable under the pleadings and proof to the underground ore mining employees at plaintiff's Spaulding iron ore mine."

Grounds numbered 9 to 30, both inclusive of the "Objections and Conclusions of Law" of Petitioners-Plaintiffs Sloss-Sheffield Steel & Iron Company and Republic Steel Corporation are identical with grounds 16 to 37, both in-

clusive, of "Objections to Conclusions of Law" of Petitioner-Plaintiff Tennessee Coal, Iron & Railroad Company set out at Record P. 631 to 637.

(g) It is stipulated that T. C. I. Exhibits 41, 42, 43, 44, 45 and 46, consisting of hundreds of pages, shall not be set out in entirety in the record, but that the Clerk of the District Court shall certify to the Clerk of the Circuit Court of Appeals, and there shall be printed in the record the following with respect to said Exhibits:

T. C. I. Exhibits 41, 42, 43, 44, 45 and 46.

Tennessee Coal, Iron & Railroad Company Exhibit No. 41, introduced by the plaintiffs, consisted of the minutes of meetings between George B. Neal, Superintendent of the Wenonah Division, and employees who later became affiliated with the defendant unions. These minutes show the meetings were for the purpose of discussing individual grievances. They did not cover hours of work or terms of employment. The minutes offered were dated as follows:

July 19, 1934
October 30, 1934
January 8, 1935
February 2, 1935
February 16, 1935
February 26, 1935
August 22, 1935
September 19, 1935
December 19, 1935
January 9, 1936
January 21, 1936
April 7, 1936
April 22, 1936
July 12, 1939
July 28, 1939
October 12, 1939
November 21, 1939
December 14, 1939
January 5, 1940
January 16, 1940
March 5, 1940
June 4, 1940
August 28, 1940
September 5, 1940
October 1, 1940
October 22, 1940

November 2, 1936
May 20, 1937
June 30, 1937
March 26, 1938
April 16, 1938
August 23, 1938
November 18, 1938
December 8, 1938
February 2, 1939
February 23, 1939
March 30, 1939
April 27, 1939
May 20, 1939
October 31, 1940
November 13, 1940
December 19, 1940
January 30, 1941
February 13, 1941
March 6, 1941
April 5, 1941
April 15, 1941
May 1, 1941
May 15, 1941
May 22, 1941
June 5, 1941
June 19, 1941

Tennessee Coal, Iron & Railroad Company Exhibit No. 45 consists of minutes of meetings of employees from various divisions with E. M. Ball, General Superintendent, or G. B. Neal, General Superintendent. The minutes offered in evidence are from the meetings held on the following dates:

July 16, 1934
July 17, 1934
November 9, 1934
November 22, 1934
November 27, 1934
January 11, 1935
January 18, 1935
January 31, 1935
February 19, 1935
February 20, 1935
March 29, 1935
May 29, 1935
June 11, 1935
June 11, 1935
June 12, 1935
July 6, 1935
July 13, 1935
July 23, 1935
August 28, 1935
August 28, 1935
August 29, 1935
September 14, 1935
October 14, 1935
January 17, 1936
January 27, 1936
March 13, 1936
May 1, 1936
May 13, 1936
May 27, 1936
May 28, 1936

| | |
|---|---|
| June 13, 1935 | June 10, 1936 |
| June 20, 1935 | August 11, 1936 |
| June 24, 1935 | August 13, 1936 |
| June 26, 1935 | August 18, 1936 |
| June 28, 1935 | October 22, 1936 |
| July 1, 1935 | November 12, 1936 |

October 7, 1937

Tennessee Coal, Iron & Railroad Company Exhibits Numbered 43 and 42 purport to bring the minutes begun in Exhibit 45 up to date of January 1, 1941. The dates are as follows:

Exhibit 43.

| | |
|---|---|
| June 9, 1938 | May 31, 1939 |
| October 27, 1938 | July 28, 1939 |
| December 1, 1938 | October 4, 1939 |
| December 16, 1938 | November 6, 1939 |
| January 17, 1939 | February 5, 1940 |
| January 28, 1939 | June 28, 1940 |
| February 22, 1939 | September 6, 1940 |
| March 31, 1939 | November 25, 1940 |

Exhibit 42.

| | |
|---|---|
| January 23, 1941 | April 1, 1941 |
| February 5, 1941 | April 11, 1941 |
| February 6, 1941 | May 8, 1941 |
| February 20, 1941 | May 23, 1941 |
| March 3, 1941 | June 11, 1941 |
| March 31, 1941 | June 13, 1941 |

Tennessee Coal, Iron & Railroad Company Exhibit Number 44 contains minutes of meetings between em-

ployees in the Muscoda Division. The dates of these minutes introduced are as follows:

September 27, 1934
November 1, 1934
November 21, 1934
December 13, 1934
December 31, 1934
January 15, 1935
February 6, 1935
February 27, 1935
March 11, 1935
April 10, 1935
April 23, 1935
May 21, 1935
June 12, 1935
July 10, 1935
July 19, 1935
August 28, 1935
September 13, 1935
November 6, 1935
November 29, 1935
December 9, 1935
December 19, 1935
December 30, 1935
January 7, 1936
January 21, 1936
February 18, 1936
April 1, 1936
May 7, 1936
September 2, 1938
January 31, 1939
April 19, 1939
May 1, 1939
September 26, 1939
December 5, 1939
May 1, 1940
September 3, 1940
November 20, 1940
February 4, 1941
March 29, 1941
April 8, 1941
July 1, 1941

Tennessee Coal, Iron & Railroad Company Exhibit Number 46 contains minutes of meetings between employees in the Ishkooda Division. The dates of those minutes introduced are as follows:

July 18, 1934
November 5, 1934
January 3, 1935
January 7, 1935
February 7, 1935
March 20, 1935
May 29, 1935
June 13, 1949
July 7, 1949
November 2, 1939
January 10, 1940
February 8, 1940
April 17, 1940
May 16, 1940

| | |
|---|---|
| October 7, 1935 | June 12, 1940 |
| November 18, 1935 | July 12, 1940 |
| January 23, 1936 | August 13, 1940 |
| February 21, 1936 | September 4, 1940 |
| October 28, 1936 | October 8, 1940 |
| September 21, 1937 | November 20, 1940 |
| October 7, 1937 | December 11, 1940 |
| November 11, 1938 | January 8, 1941 |
| January 11, 1939 | February 12, 1941 |
| February 8, 1939 | March 12, 1941 |
| March 8, 1939 | April 9, 1941 |
| March 23, 1939 | May 14, 1941 |
| April 12, 1939 | June 10, 1941 |
| May 10, 1939 | |

None of the minutes above enumerated (T. C. I. Exhibits 41 to 46, both inclusive) contain any discussion of Portal-to-Portal. Tennessee Coal, Iron & Railroad Exhibit Number 45 shows in the meeting of June 13, 1935, that a contract was presented; but the contract is not in the minutes.

The minutes of May 27, 1936, show that an agreement was presented. That agreement was not in the minutes of the meeting, nor was it attached thereto, but T. C. I. Exhibit No. 10-A does not contain a proposed contract attached to letter dated May 26, 1936, T. C. I. Exhibit No. 10.

This 17 day of March, 1942.

E. L. ALL,
BORDEN BURR,
Attorneys for Plaintiffs.
CRAMPTON HARRIS,
.....,
Attorneys for Defendants Affiliated with International Union of Mine, Mill and Smelter Workers.

J. Q. SMITH,
RALPH W. QUINN,
W. F. SPENCER,
Attorneys for Defendants Affiliated with American Federation of Labor,
JEROME A. COOPER,
Attorneys for Philip B. Fleming, Administrator of Wage and Hour Division, United States Department of Labor —Intervener.

Filed March 19, 1942.

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In the District Court of the United States for the Southern Division of the Northern District of Alabama.

Tennessee Coal, Iron & Railroad Company, a Corporation, Plaintiff,
vs. Civil Action No. 5232.
Muscoda Local No. 123; et al, Defendants.

Sloss-Sheffield Steel & Iron Company, a Corporation, Plaintiff,
vs. Civil Action No. 5233.
Sloss Red Ore Local No. 109, et al, Defendants.

Republic Steel Corporation, a Corporation, Plaintiff,
vs. Civil Action No. 5234.
Raimund Local No. 121, et al, Defendants.

The Above Entitled Causes, having been consolidated for purposes of trial, came on for hearing in the District

Court of the United States for the Southern Division of the Northern District of Alabama, at Birmingham, Alabama, beginning at 10:00 A. M., July 8, 1941.

Appearances:

Messrs. Borden Burr and Grady W. Patterson of Benners, Burr, McKamy & Forman, Birmingham, Alabama, and Messrs. E. L. All, S. M. Bronaugh and B. A. Monaghan of Bradley, Baldwin, All & White, Birmingham, Alabama, for Plaintiffs.

Mr. Crampton Harris, of Birmingham, Alabama, and Mr. J. A. Lipscomb, of Bessemer, Alabama, for all Defendants affiliated with International Union of Mine, Mill & Smelter Workers.

Mr. J. Q. Smith, Mr. Ralph W. Quinn and Mr. W. F. Spencer, of Birmingham, Alabama, for all defendants affiliated with American Federation of Labor.

Mr. Abner Brodie, of Washington, D. C., and Mr. Jerome A. Cooper of Birmingham, Alabama, for Philip B. Fleming, as Administrator of Wage and Hour Division, United States Department of Labor, Intervener.

PROCEEDINGS.

The Court:

Now, I want to say at the beginning of this case all the lawyers and the judge too,—we want to keep a cool head. It is going to be hot and the Court is going to be patient with you if it can, but at the same time we don't want any party in the case doing anything other than what is to be done unto others; that is, we don't want to

say things we shouldn't. The Court doesn't want to have to reprimand anybody, and for that reason I think we can have an understanding and go ahead with the case without any trouble at all.

Now, how many defendants in this case?

The Clerk:

I can call them and let them answer to their names and make arrangements for them to sit back here.

(Thereupon the clerk called the defendants as follows: Muscoda Local No. 123, an unincorporated association affiliated with the International Union of Mine, Mill & Smelter Workers, and W. C. Gunnin, Pete Dulaney, R. H. Martin and John Thompson individually and as officers and members of such local, all of whom answered present.

Wenonah Local No. 157, an unincorporated association affiliated with the International Union of Mine, Mill & Smelter Workers, and C. J. McDaniel, W. B. Lemley, R. E. Lemley and Ward Jefferson, individually and as officers and members of such local, all of whom answered present.

Ishkooda Local No. 153, an unincorporated association affiliated with the International Union of Mine, Mill & Smelter Workers, and E. A. Sisemore, L. H. McBrayer, Elmore Mitchell and Dennis Hart, all of which defendants answered present.

Van D. Jones, C. L. Pegues and Frank Allen, individually and as officers of the International Union of Mine, Mill & Smelter Workers, and all of said defendants answered present.

Muscoda Local No. 21935, Red Ore Miners Union, an unincorporated association affiliated with the American

Federation of Labor and Fred Trammell, Joe P. Bell, W. R. Headrick and I. V. Robinson, all of which defendants answered present except the defendant Joe P. Bell, and when the name of that defendant was called, the following occurred:)

A Voice in the Courtroom:
He is sick.

The Court:
Who represents him?

Mr. Smith:
We represent him.

(Thereupon the clerk called the following defendants:

Wenonah Local No. 21936, Red Ore Miners Union, an unincorporated association affiliated with the American Federation of Labor, and [redacted] W. Kendrick, G. L. Batson, Will McGhee and W. T. Maxwell, none of which defendants answered present.

Thereupon the following occurred:)

The Clerk:
Who represents the—

Mr. Smith:
We represent them.

(Thereupon the clerk called the following defendants:

Ishkooda Local No. 21937, Red Ore Miners Union, and J. S. Pitts, James A. Bailey, Jr., A. E. Wesley, John White, Nathan Smith and James Snow, all of whom an-

swered present except J. S. Pitts, A. E. Wesley, John White and Nathan Smith.)

Mr. Smith:
We represent all those, if Your Honor please.

The Clerk:
They are ready, then?

Mr. Smith:
Yes.

(Thereupon the clerk called the following defendants:

Sloss Red Ore Local No. 109, an unincorporated association affiliated with the International Union of Mine, Mill and Smelter Workers, and John Hill, Jesse Gaines, and W. A. O'Neal, individually and as members and officers of such local.)

The Clerk:
Who represents those defendants?

Mr. Lipscomb:
We do.

The Clerk:
Ruffner Miners Union Number 519, an unincorporated association affiliated with the International Union of Mine, Mill and Smelter Workers, and Frank Parker, Hosea Bickerstaff and George T. Drummond, individually and as members of such local.
Who represents those?

Mr. Lipscomb:
We do.

The Clerk:

Raimund Local Number 121, affiliated with the International Union of Mine, Mill and Smelter Workers and John Butler, Lewis Tarrant, B. G. Stephens.

You represent them also?

Mr. Lipscomb:

Represent them also.

The Clerk:

Van D. Jones, C. L. Pegues and Frank Allen, individually and as members and officers of the International Union of Mine, Mill and Smelter Workers.

Mr. Lipscomb:

Represent them also.

The Clerk:

Unit Number 8, Brotherhood of Miners of Captive Mines of Alabama, Melvin Lawrence, C. W. Eady and J. E. Thornton.

Represent them also?

Mr. Lipscomb:

No.

The Clerk:

Who represents Unit Number 8? Is there any lawyer representing Unit Number 8, Brotherhood of Captive Ore Miners?

Mr. Smith:

Mr. Clerk, you neglected to call S. E. Roper and W. O. Hare as individuals and as officers and members of the American Federation of Labor.

The Clerk:
S. E. Roper and W. O. Hare, individually and as officers and members of the American Federation of Labor.

Mr. Smith:
They are here.

The Court:
Who is supposed to represent these defendants?

Mr. Smith:
Your Honor, I don't think they have been represented since we have been having these hearings.

Mr. Burr:
What defendants is that?

The Clerk:
Unit Number 8.

Mr. Burr:
What case is that in?

The Clerk:
Republic Steel.

Mr. Burr:
I don't know. That is an organization some of our employees are supposed to belong to. I suppose we will have to handle it as a default proposition and travel on with the case.

The Clerk:
Both sides say they will take care of their own witnesses and not have them called.

The Court:
Is that true of both sides?

Mr. Burr:
That is true of ours.

Mr. Brodie:
Beg pardon; I didn't hear you.

The Court:
Each side will take care of their own witnesses?

Mr. Brodie:
Yes, sir.

The Court:
What did you wish to say?

Mr. Brodie:
I wish to present two motions to the Court. Will Your Honor hear me now?

The Court:
Yes.

Mr. Burr:
We haven't had notice.

The Court:
Have you given the other side notice?

Mr. Brodie:
No, sir, we have not.

The Court:
You are supposed to give the other side a copy.

Mr. Brodie:

One of them relates to the question of interrogatories discussed before Your Honor the other day, and Your Honor ruled that the plaintiffs would not be required to furnish other answers on their representation that the material to which the interrogatories related would be taken out of the complaint. I have—just a moment. I have a stenographic transcript of that, and I would like to call Your Honor's attention precisely to what happened at that time.

The Court:

You can tell me what happened.

Mr. Brodie:

All right. Your Honor will recall that the motion concerned itself—the motion Thursday concerned itself with interrogatories relating to costs. The particular interrogatories in question were 26 and 27, and during the discussion as to whether the plaintiffs had answered those sufficiently, Mr. Burr stated that all the material in the case to which those interrogatories related would be stricken from his complaint and he was going to file an amendment to the complaint taking out of the case any question of costs, and—

The Court:

Has he done that?

Mr. Brodie:

He has filed an amended complaint—rather, an amendment to the complaint striking out from the complaint a number of irrelevant and argumentative allegations which the Court has already ruled are not the concern of this Court in this issue. Specifically, he has taken out all the references to the Administrator's opinion and

so forth. He has not, however, removed from the complaint the allegations relating to the impossibility of performance, to contracts, to increased costs and things of that nature to which those interrogatories relate.

I would like to call Your Honor's attention to page 22 of the T. C. I. complaint under Section 7.—Does Your Honor have that?

The Court:

I have it.

Mr. Brodie:

Under Section 7, entitled "Probability of great, if not irreparable injury," paragraph 4 states—Well, the preliminary paragraph states that "The plaintiff is in immediate peril of suffering great and irreparable injury because, among other things:

"4. Of the probable loss or interference with the performance of government contracts (and other existing contracts for the production of products for the national defense)."

Paragraph 7: "Of the great expense that the plaintiff would be put to in changing its operations from the 'working place to working place' plan to the 'portal to portal' plan."

On page 24 the following allegations still remain in the complaint:

"D. To undergoing the perils incident to its defense and other contracts.

"B. The planning and institution of new methods of operation which will result in great loss and damage to the plaintiff because—

"(a) Compliance will result in a large reduction in production," and so forth, and on page—all the rest of that paragraph. I don't want to take Your Honor's time to read the whole now.

Page 25, top of the page, "the loss of working time which plaintiff will continue to suffer."

The second paragraph on page 25, "On the basis of loss of production as estimated by the plaintiff, the installation of the 'portal to portal' system would mean a loss on an annual production of" so many tons.

Down in the center on page 25, starting with, "If the time of work at the usual working places is reduced from eight to six or less hours (this apparently will be necessary because increase in cost would become prohibitive if the present and contracted for eight hours per day work at the working place was changed to six hours compensated work with payment of time and one-half for the additional two hours of over time spent in going to and from the working place), the earnings under the incentive plan will be greatly reduced, if not altogether eliminated."

On page 26 the following allegation still remains in the complaint:

"(e) It would place the plaintiff at a serious disadvantage with its competitors and would deprive it of a substantial portion of its existing market."

"(g) The plaintiff has placed itself subject to the call of national defense, and based upon the requirements of national defense, has already contracted for or indicated it will have to increase its annual production approximately 20 percent above the 1940 production figures," and similar material.

"(h) Contains references to the impossibility of operating under the portal to portal plan and says to change this face to face method would be difficult and costly.

There is still remaining in the complaint at page—No, that is a collective bargaining contract, solely.

Now, on Thursday, during the course of the discussion, the Court asked me, "If it is stricken from the complaint do you want all that?"

My answer to Your Honor was, "If all those allegations are out, the denial of due process, about the impossibility of complying, about the excessive costs, about the cost of national defense, are stricken and we haven't all those allegations in the complaint, we don't want these answers.

"Mr Burr:

They will be stricken, Your Honor. We want to get down to the issues in this case. That is the first thing I did this morning, was to try to work out an amendment. I am going to present an amendment striking out anything that involves costs."

Under the circumstances, if Your Honor please, we do not have the information regarding costs; the allegations regarding them are still in the complaint, and we have to come into this Court again in the dark. I submit counsel should not be permitted to play ducks and drakes with either the Court or us. Your Honor ruled on July 1st these questions should be answered responsively. They were not answered. The motion was made last Thursday and argued, and it was on the statement that all allegations relating to the subject matter of the interstate commerce would be stricken from the complaint that Your Honor denied our motion for responsive and full answers to those interrogatories.

Now, we call upon the Court to require the plaintiffs to give us the information that was requested in the interrogatories, or to require them to amend their complaints to strike from them all reference to costs and the impossibility of performance, and national defense contracts, and so forth, as Mr. Burr stated he would do, and I also respectfully request the Court, after this information is furnished to us, that we have a sufficient recess during the trial of this case to allow us to assimilate it and break it down and afford us an opportunity to meet those allegations, a right which has been denied to us by the denial of the motion to take oral depositions and to have the information requested in these interrogatories.

What I have said with reference to the Tennessee Coal, Iron & Railroad Company complaint applies to the other two complaints, and I ask that the plaintiffs be required to give us this information, and that the Court give us sufficient recess to allow us time to meet those contentions.

The Court:

As I remember it, the Sloss-Sheffield Company and Republic had answered those questions.

Mr. Brodie:

They had answered Question number 26. They had not answered sufficiently question 27. That, however, in view of Mr. Burr's statement these issues were going out of the case, was not argued. The question of whether the answers of the Sloss-Sheffield Company and the Republic Corporation to interrogatory 27 were sufficient was not argued. The thing that was argued was the answer to question 26, and my recollection is that the answer to question 26 was supplied by Republic and Sloss was sufficient. I would like an opportunity to look at those answers for a minute. But they all stated they would

amend, and Your Honor said, "In view of that statement I will deny your application," but we did not argue question 27 at all with regard to any of these plaintiffs.

The Court:

All right, sir.

Mr. Burr:

If Your Honor please, I assure Your Honor I haven't been trying to make ducks or drakes of either the Court or these gentlemen.

What I have been trying to do is to get a trial of this case, and I think this is the sixth time I have been confronted with a request for a recess or continuance.

Now, the other day, to get the case tried, while I was anxious to go into the question of collateral matters that relate to irreparable injury, I was not willing to have those collateral matters interfere with the prompt trial of this case, and so, in order to avoid that question, I stated I would amend my complaint so they would not be issues in the case, and I will state to Your Honor that is the way I have amended my complaint. If I have not amended it that way, if Your Honor will suggest how it should be done, I will be glad to amend it that way although we might thereby lose the advantage of some testimony we might otherwise introduce.

Now, let's see what he claims hasn't been stripped from this complaint. You will recall interrogatory 26 asked for the cost of iron ore production, and interrogatory 27 asks for the cost of pig iron production, a matter which I don't see could be material in this case.

Your Honor sees what has been stricken from the complaint. I have stricken everything I can see that involves the question of costs.

Let's take the ones that do involve it. Take page 26, defense contracts. That doesn't involve the question of

costs in the remotest way. The way that comes into the complaint is not in connection with costs, but as pointed out in the bill, and as I state now, and as we expect to prove by the evidence, every government contract makes us subject, without reference to whether it is the law or not, to the regulations of this Administrator, so, naturally, in order to preserve those contracts we had to follow the Administrator's interpretation.

Your Honor is familiar with the recent opinion of the Supreme Court with reference to government purchases that they could write therein such restrictions as they pleased.

That is what that is left in there for and that alone. To show you what the cost of complying with these contracts will not be an issue is that averment. What we are averring is because, as we see it, of this unjustifiable ruling of the Administrator we will be adversely affected in the performance of our national defense contracts of which we have millions of dollars. That is all that is involved in the question of government contracts.

Let's take up the next one.

Of course, Your Honor, it is not necessary—Mr. All suggests I call attention under that to the effective power of the Administrator under the hot goods clause of the Act. We are not raising there any question of cost. We are raising the question, and the sole question of the damage that will be produced; that under these contracts we will be put practically under the supervision of the Administrator.

The next one he called attention to is, as I remember it, on page 24.

Mr. Brodie:
23. Mr. Burr.

Mr. Burr:
23?

Mr. Brodie:
Paragraph 7.

Mr. Burr:
"Of the great expense that the plaintiff will be put to in changing its operations from the 'working place to working place' plan to the 'portal to portal' plan."

Now, that doesn't involve the cost of either pig iron or iron ore. We expect to prove under that, to give you a concrete illustration, that one of these companies, to save transportation time, has had to open up a new travel way that was available in some old workings.

The Court:
In other words, you will be put to some more expense?

Mr. Burr:
Yes, sir.

The Court:
In other words, you wanted to get them in quickly in order to—

Mr. Burr:
Had to do it.

The Court:
—save that time?

Mr. Burr:
To save that time.

The Court:
I see.

Mr. Burr:
It is not a matter of costs, either directly or indirectly.

The Court:
I see.

Mr. Burr:
All right.

"B. The planning and institution of new methods of operation which will result in great loss and damage to the plaintiff because compliance will result in a large reduction in production."

Now, that doesn't involve the cost of production at all. That involves the loss in the production of the tonnage of ore that we are able to get out. Certainly you can't interpret a law as saying you are going to read into it the costs.

We are willing now—we have had to go down and buy another furnace to try to keep up with our production. We have had to buy iron ore from other people. We propose to show that,—not in money,—not to try to trace it into money, but we propose to show if it continues on the present basis we have lost 500,000 tons annually of production under the ruling of the Administrator. There are no costs involved there, and none will be involved.

The next one is on page 25:

"The loss of working time would be much greater if the employees' contention that time spent in going to and from the bath house, the time spent in transportation from portal to portal and the thirty minutes lunch period are included as a part of the workday for which they should be compensated."

That is not an element of cost. What we propose to show there is that having only one opening into our mines, and having only one portal now through which the men and iron ore and material has to go in and go out, to reduce the working time from eight hours to six and a half hours at the face, we have lost that much time of the men's productive ability. No costs are involved and none will be involved.

What is the next one? I may have overlooked some.

Mr. Brodie:

Next to the last paragraph on page 25.

Mr. Burr:

Next to the last paragraph on page 25?

Mr. Brodie:

Yes, sir.

Mr. Burr:

It is the same thing as that.

"If the time of work at the usual working places is reduced from eight to six or less actual hours (this apparently will be necessary because increase in cost would become prohibitive if the present and contracted for eight hours per day work at the working place was changed to six hours compensated work with payment of time and one-half for the additional two hours of over time spent in going to and from the working place), the earnings under the incentive plan will be greatly reduced, if not altogether eliminated."

What does that mean? It means either one of two things, that we have either got to be content with six hours work, or, if the Administrator's contention is cor-

rect, we have to pay time and a half for two hours overtime. It doesn't go into cost. We will prove we can't afford to pay these miners,—it would be prohibitive,—we could buy the iron ore elsewhere if it were available,—to pay the iron ore miners for mining ore on an overtime basis. We are bound to confine it to the six and a half hours under the Administrator's ruling. That is the only one that mentions cost at all, and it is clearly with reference to the overtime ruling, and that is all we propose to use it for.

(g) On page 26:

"The plaintiff has placed itself subject to the call of national defense, and based upon the requirements of national defense, has already contracted for or indicated it will have to increase its annual production approximately 20 percent above the 1940 production figures. It would be difficult, if not impossible, to meet this requirement if the present 'working place to working place' system were changed. Said defense contracts as to costs were based upon the existence and continuance under the existing contracts of the 'working place to working place' plan."

The Court:
He mentioned (e) too, as well as (g).

Mr. Burr:
All right.

"(e) It would place the plaintiff at a serious disadvantage with its competitors and would deprive it of a substantial portion of its existing market."

Well, that doesn't involve any cost. It involves the sole question by reason of the fact—all that will not come

in on our direct case. I will assure your Honor of that, but assuming the Administrator has got the nerve to try to defend his opinion as indicated,—we say we have stripped the opinion from the case; we will try the case on the law, but if and when the Administrator comes in here trying to apply to Alabama the laws of Utah and Arizona and Lake Superior and copper mines and other things, we expect to raise the question that would be a violation of those provisions of the law based on the theory competition is the main basis of the Act. That is all that is involved there.

Next is the national defense.

Next is the plaintiff's cycle of operation. The only thing that is involved in the cycle of operations is this—

The Court:

I don't think he mentioned (h).

Mr. Burr:

He could have done so just as easily.

Mr. Brodie:

Yes, I did.

Mr. Burr:

I submit to this Court, instead of playing ducks and drakes with anybody, I have made a sincere effort to eliminate these provisions, and if I haven't eliminated them, I will ask Your Honor to tell me how to eliminate them to get through with this effort every day to continue this case.

I assure Your Honor, as far as we are concerned, in presenting our case we don't expect in the remotest degree to go—

The Court:

To go into costs?

Mr. Burr:

—into the cost of producing iron or of pig iron or plate steel anything else.

Mr. Brodie:

May I reply, Your Honor?

The Court:

Yes. Make it short.

Mr. Brodie:

With respect to the first point Mr. Burr made, that paragraph 4 on page 22 does not involve the question of costs, I want to say here and now that there is no regulation of the Administrator—under the statute the Administrator is empowered in certain circumstances to issue regulations, and those regulations have the force and effect of law. In this instance the Administrator has no power to issue any regulations, and claims to have no power to issue any regulations, so that question is out.

They say "of the probable loss or interference with the performance of government contracts." Certainly that involves the question of costs. This whole matter involves the question of costs, because these people have continued to operate as they operated theretofore and paid time and a half for the hours in excess of forty. They claim the costs of doing that are prohibitive. Now, they don't sell iron ore. They make pig iron and make steel, and we want to know what products they manufacture are going to be affected. The price of getting out iron ore is only the component of the cost of pig iron and steel, and if they allege an impossibility of operating under the portal to portal plan, or any system which will require them to increase the cost of extracting ore from the mines, we are entitled to the information on that, so we can have an opportunity to determine whether or not

their allegation is a fair one. We don't have to come into Court in the dark without an opportunity to examine anybody or without access to any figures relating to any of these allegations which they have brought into the complaint.

Moreover, it says they are also subject to the Administrator's power under the hot goods section of the statute. I want to say right now the Administrator has no power under the hot goods section of the statute. The Administrator must come into Court, and it is up to the Court to decide whether an injunction shall be granted, or if a preliminary injunction is applied for, or an order of restraint is applied for, it is up to the Court to determine whether the law has been violated and whether the party has thus become subject to the hot goods provision of the Act. The hot goods provisions of the Act are not self-operating. The Court must determine that.

With respect to the allegations on page 23 regarding the expense of putting into operation the portal to portal plan, counsel states that bears only upon the expense of getting the men in and getting the men out. They don't get the men in and get the men out for the fun of it, because it is just a joy ride; they get the men in and get the men out because it is part of the process of producing ore and producing iron and producing finished products. The cost bears upon the expense of producing the articles which the plaintiffs are engaged in selling. That cannot be considered as a vacuum divorced from the business of these plaintiffs.

The same thing is true with respect to the allegations on page 24 relating to production. That is purely and simply a matter of costs. I have already pointed out they can operate as they operated previous to May 1st by paying time and a half for over time. They contend the cost would be excessive. I submit that is nothing more or less than a problem of costs. If they could produce

the ore under the old system, they could continue under the old system and pay time and a half.

But we are entitled to know just what the situation with respect to those costs is, how they are going to be burdened, what expenses they are going to be put to, how those expenses will affect the costs of their finished products bears upon the very issue in this case which they have raised.

These issues are not to be tried in any intellectual vacuum, I submit. They must be tried in view of the allegations which the plaintiffs have brought into the case themselves.

With respect to the allegations on page 25 where Mr. Burr read that one paragraph and said this refers only to the loss of time,—loss of working time,—rather, the increased cost of working time if the employees' contention regarding the bath house to bath house prevails, if Your Honor will look at that Your Honor will see that is merely an introduction to the very next paragraph which says:

"On the basis of loss of production as estimated by the plaintiff, the installation of the 'portal to portal' system would mean a loss on an annual production of 4,320,309 net tons of iron ore and limestone (Plaintiff's 1940 production) of 381,324 tons."

Limestone has nothing to do with this case.

Again I say if they can produce more ore under the old system, and if they want to continue under the old system, there is nothing in this statute which prevents them. This statute imposes no maximum. Congress says, in passing this statute, if you want to work your people more than 40 hours a week, you can do so by paying time and a half. There again we have the cost situation.

Everything the plaintiff has done has been keeping us in the dark.

The same thing applies to Paragraph (e) on page 26 where it is contended that the plaintiffs would be placed at a serious disadvantage with their competitors.

Now, if competition is not based upon costs, I don't know what it is based upon. Certainly the cost problem becomes an important one. The only reason that allegation is in the complaint is because the problem of costs is involved.

The same thing is true with respect to paragraph (g) on page 26 where they say:

"The plaintiff has placed itself subject to the call of national defense, and based upon the requirements of national defense, has already contracted for or indicated it will have to increase its annual production approximately 20 percent above the 1940 production figures. It would be difficult, if not impossible, to meet this requirement if the present 'working place to working place' system were changed. Said defense contracts as to costs were based upon the existence and continuance under the existing contracts of the 'working place to working place' plan."

The same thing is true with respect to (h), the plaintiff's cycle of operations. If it be a fact the cycle of operations is disrupted, then they could continue to operate under the same method they have always operated, and pay time and a half for work in excess of forty hours during the week, and the problem again becomes one of costs.

Every one of these allegations, allegations respecting impossibility of operating under this plan and so forth, the allegations respecting irreparable injuries, every one of them relate to cost and nothing else. They can't relate to anything else but cost.

No allegations regarding costs were taken out of the complaint that amount to anything. The only things

that were taken out of the complaint were all the argumentative allegations with respect to the outrages of the things the Administrator has done, and that was done after that whole question was argued and re-argued and briefed and passed upon by this Court. What the Administrator has done, the mental processes of the Administrator, his good faith, all those things had no bearing upon the issues of this case, and all they have done is to take out of the complaint those allegations and a few more argumentative statements.

The allegations respecting costs remain in the complaint, and under those circumstances, I respectfully ask Your Honor to direct either that they give us that information, as Your Honor has previously ruled we are entitled to, or that Your Honor direct them to take out from the complaint all these allegations about which we complain, and a stipulation put in upon the record that no evidence will be offered respecting those allegations.

We have been put off continually in an endeavor to get this information.

I have stated before and I will state again we are not afraid to meet the issue of costs. We are not afraid of that issue. If they want to try that issue out, we are willing to meet it if we have an opportunity to get the information we are entitled to under the rules which have made out of a lawsuit a trial for justice and not a sporting proposition where each party endeavors to surprise the other. We are entitled under the rules to know what problems we will have to meet and not a vague guess.

The Court:

Mr. Burr, you are not going into the question of costs?

Mr. Burr:

No, sir, I haven't the remotest idea of going into the question of costs.

I might say this: I was turning over in my own head about one illustration he used,—how time and a half would relate to the question of costs. We are not going to try whether some economist or protestant will say we can run our plant. I know these gentlemen over here are as full of theories as a dog is of fleas. What we are trying—the law applies to all plants, not well conducted plants alone. While the gentleman admitted the Administrator has not the power to make the law, I want to tell you when the Administrator is sitting in the saddle and he calls you into Court on the hot goods clause, his word is law until you can get a Court ruling.

Now, what we propose to show on the overtime proposition—roughly, the Tennessee Company employes,—that appears in the complaint,—about 2600 men. Roughly, these men get about ten dollars a day on the eight-hour face to face plan. It is so easy for people to come in and tell you to cut your time down to six hours and pay these people time and a half for overtime. I don't care how badly our operations are conducted particularly, —we don't believe they are,—if we had time to mess around with these things we wouldn't run away from that charge, but here is the $10,000 payroll on the 8-hour basis, and those same men under this order, say, would work 6 hours a day. All right. Now, the overtime for those two hours would amount to, instead of $10,000 a day, we would be paying about $25,000 a day, and about one-fourth of that would be the hour and a half as Your Honor can readily see. There is an actual fact. I don't care anything about your economists,—I haven't got any patience with them on matters of this sort. What I want to present are the bare, bald facts. Here is a client of mine, by an order—by a rule or interpretation—I keep calling it an order because that is what it amounts to,— a rule or interpretation we are faced with the question of whether if we get production we pay these men time

and a half for overtime. I think we have stripped that complaint of costs. I am perfectly willing any time I get in costs Your Honor to raise your hand, and I will immediately pass on to something else.

The Court:
The motion is overruled.

Mr. Brodie:
Your Honor grant me an exception?

The Court:
Yes. You don't have to do it.

Mr. Brodie:
May I state the grounds of the motion?

The Court:
You don't have to. It is not necessary.

Mr. Brodie:
I have one other motion. Mr. Burr and I discussed this matter over the phone about five o'clock yesterday afternoon, and that refers to permission to enter the mine —for our people to enter the mine and look around and take photographs and make dust counts and so forth.

Mr. Burr told me he would have no objection to one engineer going in and making dust counts of the atmosphere. He said he would also object to an economist whom we would also like to be present to make an inspection,—not make an inspection of the mine but to see it. He said he would not permit it.

Under Rule 34—I have here a formal, written motion covering that.

The Court:
Go on to your law.

Mr. Brodie:

Under Rule 34 it is provided, "Upon motion of any party showing good cause therefor, and upon notice to all other parties, the Court in which an action is pending may:

"1. Order any party to produce and permit the inspection and copying or photographing of any documents", etc.; or

"2. Order any part to permit entry upon tracks, land or other property in his possession or control for the purpose of inspecting, measuring, surveying or photographing the property or any designated relevant objection or operation thereon.

"The order shall specify the time, place and manner of taking the inspection and taking the copies or photographs, and may prescribe such terms and conditions as are just."

All we want, as I stated—Mr. Burr has agreed, as I understand it,—if I am wrong he will correct me,—that our engineer may go in and make dust counts in the mines, and the only other thing we want is our economist, a member of the staff of the Department of Labor,—the engineer wants him to help him take pictures and with his equipment, and I would like for him to make a study of the mine. Both of these men are in the employ of the government and connected with the Department of Labor, and I submit under the rules we should be given that opportunity. The only purpose of that is to present all the facts to Your Honor. If the plaintiffs have nothing to hide I am sure they can have no objection to these two men going into the mine.

The engineer—with respect to the engineer, Mr. Burr stated he would permit him to go in once, and that was all.

To get dust counts he has to take certain samples of the atmosphere,—I am not familiar with the technique of it,—to get dust counts he will have to take samples of the atmosphere—he will not interfere with the operation of the mine, but he will have to go back a few times. How many, I don't know.

The Court:

What is the relevancy of the dust counts?

Mr. Brodie:

The purpose is to show whether these men were at work before they reached the face. Bearing upon that question are a number of factors, among which is whether they are exposed to any hazards of employment while they are in the mine between the portal and the face, whether the conditions are healthful or otherwise. It has been suggested there is no difference between the time spent going between the portal and the face and the time spent by a man going from his home to the mine on a trolley car. We would like to have an opportunity to show the actual conditions with respect to ventilation and atmosphere and ease of walking and danger of falling rock and various other factors; that these men are subjected to the hazards of their employment from the minute they enter the portal of the mine.

Rule 34 gives us this opportunity. That can be done without any interruption—

The Court:

With reasonable restrictions.

Mr. Brodie:

Yes, sir.

The Court:
It is discretionary with the Court. I think the plaintiffs will permit two men—

Mr. Burr:
When he gets through, Your Honor, I will state my position.

The Court:
All right.

Mr. Burr:
He has said so much I will have to be heard on it.

The Court:
Are you through?

Mr. Brodie:
Yes, sir.

The Court:
All right; I will hear Mr. Burr.

Mr. Harris:
I will probably want to be heard when Mr. Burr gets through.

Mr. Burr.
Along the same lines as his?

Mr. Harris:
In part.

Mr. Burr:
Suppose you go ahead.

The Court:

I will hear you now, Colonel.

Mr. Harris:

In reference to the points Mr. Brodie has mentioned, as I view it from the standpoint of the men who work in the mines, the conditions which confront those men are a vital part of this case. When a man comes to the mines of the Tennessee Coal, Iron & Railroad Company, he comes in his street clothes. He goes to a bath house and changes; he was not subject to the orders of the company; he was not assigned by the company. The moment he comes out of that bath house dressed for work, he is subject to orders, going to any place to which they have assigned him, that man becomes confronted with certain hazards, risks and dangers to his health and to his life, so this Court, in my opinion, is vitally interested in everything that affects his safety and well being from the time he puts his check on the window and starts down into that mine until the time he comes out. It is all one productive process, and that man, subject to their orders, subject to this danger, is entitled, in my judgment, to present them to the Court, and any expert testimony which shows what he is subjected to and the conditions under which he works is of vital importance in this case.

I see no reason why, under the rules and the enlightened procedure that we have, these plaintiffs can say you can take one man down there, or they can say what kind of man we shall take down there. If it is discovery we are entitled to select the men we think can discover the most for us.

Mr. Smith:

Your Honor, we join—we think it is competent and material that the whole outlay of the mines be brought out, and we join with Mr. Harris and Mr. Brodie in respect of that motion.

Mr. Burr:

Now, if Your Honor please, I want to first discuss this matter in the light of the rule. The rule provides on the motion of any party showing good cause therefor, and getting down to the part involved here, "Order any party to permit entry upon tracks, land or other property in his possession or control for the purpose of inspecting, measuring, surveying or photographing the property, or any designated relevant object or operation thereon.

"The order shall specify the time and place and manner of making the inspection and taking the copies and photographs, and may prescribe such terms and conditions as are just."

Now, last week,—I think on the 3rd of July,—why, the attorneys for the Administrator indicated that they wanted an inspection of the mines made by an engineer. Your Honor asked me if we would have any objection to that, and I stated we wouldn't so long as we were satisfied of the competency and good repute of the engineer and of the time—the convenience.

Now, on yesterday afternoon about 5:30 I was informed for the first time that these gentlemen desired, not one engineer, but they desired two engineers, the name of neither one of which they could give me at the time, and an economist, and wanted someone to take photographs, and three lawyers. Well, I couldn't make that sort of agreement for reasons I will tell Your Honor now.

In the first place, I can't conceive of any business the lawyers have got in the mine, and I think that is out. We are not going down there. I have just gotten back from Minneapolis cross examining witnesses with reference to mines, the conditions in which are as dissimilar from our mines as night is from day, but I didn't need to go into the mines in order to cross examine them. I can't conceive

of what business an economist has got in reference to this.

I told Mr. Brodie that we had no objection to two engineers going in the mine, provided it was arranged at a convenient time, and provided our engineer could go along with them and an independent engineer we expect to employ.

Let me show Your Honor the situation. You are not going out here dealing with a piece of land or a building. You are dealing with a business that is working as continuously and as hard as it can to get out the production of iron ore. Every time you take a party down in that mine—I speak advisedly,—my people and I know what happens. There is one entrance to that mine. The men are hauled down on a mantrip, which, as soon as the hauling of the men is completed, is put in operation hauling material in the mine and ore out. We submit it wouldn't be proper to send a party down there. Every time a party goes down there we have a disorganization in the work. You have to stop supplying the people with cars; you have to have them around where the men are working, and you have to stop the work.

Now, when you get to taking photographs, it depends on who takes them and how many you want to take.

I am not going to say anything out of order, but I am going to ask these gentlemen to quit charging me, by insinuations, with trying to hide anything in this case. I am not trying to hide anything. What I am trying to do is to keep these people from disrupting our operations. I am willing for two engineers,—I am willing for the Court to pass on them,—to go down in the mine and see what they want to see.

As far as photographs, we don't object to photographs being taken, although it depends on who takes them largely what they show. I remember hearing a case tried in Shelby County about a photograph. It is one of the

most illuminating things I ever heard about photographs, but I will not take the time to go into that now.

I would suggest with reference to photographs we have in our files photographs of nearly every operation in that mine, and they are available to these gentlemen. If they don't suit them, let Your Honor appoint some photographer, some view man, and go down and take pictures, but to turn loose in these mines a bunch of people—asking us to let them go down into the mines is going entirely too far.

Mr. Brodie:
There are only two people.

Mr. Burr:
You have come down. You told me on yesterday—

Mr. Brodie:
Let me explain.

Mr. Burr:
He told me yesterday—told Mr. Monaghan—

The Court:
How many do you want?

Mr. Brodie:
I want an engineer.

Mr. Burr:
I will let two engineers go.

Mr. Brodie:
And an economist.

The Court:
I don't see any difference between an economist and an engineer.

Mr. Burr:
I wouldn't want a preacher to go. He might preach a sermon on hell fire and damnation.
Who is the economist?

(Thereupon a man stood in the Court Room.)

Mr. Burr:
There he is. He looks like I thought he would,—a nice looking young man, probably a Harvard graduate.
I am willing to make it anything Your Honor says.

The Court:
I will let two men go. Then, there is the question of time.

Mr. Burr:
I should think when we recess this week end.

The Court:
How about between shifts? When is the best time?

Mr. Brodie:
May I suggest they go down on the mantrip with the miners?

Mr. Burr:
Now, we have had a good deal more experience in running our mines than these gentlemen from Washington.

The Court:
Of course, the company wants them to go in a safe manner.

Mr. Burr:

We have had one experience of this kind with this very department.

The Court:

I am going to permit two representatives at the selection of the defendants to go down and view the mines and take pictures and view the mines and see what they want.

Mr. Burr:

We will arrange to have go with those two men our own engineers, and we will arrange to have a photographer go along too, so when they get a picture we may get one also.

Mr. Brodie:

This is each mine.

Mr. Burr:

You want to go in every mine?

Mr. Smith:

This includes Sloss and Republic too.

Mr. Burr:

Let me see if I understand. Are they going to have to go in every mine or one mine of each plaintiff? What is Your Honor going to require?

The Court:

How many mines have you of the Tennessee Company?

Mr. Burr:

We have eight,—nine mines.

The Court:
You want to go in all the mines?

Mr. Burr:
Republic has two. How many has Sloss?

Mr. All:
Sloss has two.

The Court:
Do you want to go in every mine?

Mr. Harris:
There are substantially different conditions in the various mines.

The Court:
As I understand there are different conditions prevailing in the mines. Go in each mine.

Mr. Burr:
We think that order at the proper time should be put in writing.

The Court:
Mr. Brodie, put an order in writing.

Mr. Burr:
Your Honor will have that order submitted to us before it is signed? We want an opportunity to put such restrictions in there as to protect the rights of the clients.

The Court:
If you have your engineer or some employee to accompany them, I don't see any—

Mr. Harris:

If Your Honor please, a part of the conditions surrounding the men in their work is the trip down, and the trip out on the mantrip. You see they haul the men down and don't haul ore at that time. It is our opinion that would be a reasonable thing as far as not interfering with their operation of the mines—

Mr. Burr:

If Crampton wants to ride down, I will let him ride.

Mr. Harris:

I am not going.

Mr. Burr:

I don't mind Crampton going, but I don't want these fifteen or twenty people—

Mr. Harris:

I am not going in the mine. I am in no physical condition to try a lawsuit and be wandering around underground. But I think the trip down with the mantrip—

The Court:

Is there any objection?

Mr. Burr:

If there are seven of them, it will interfere with our lowering the men into the mine.

The Court:

Use another car.

Mr. Burr:

We haven't another car.

The Court:
Let another come back and get them.

Mr. Burr:
That is what we are going to do.

Mr. Harris:
Lowering the men is part of the working conditions.

Mr. Burr:
I want to take an exception to the ruling. I don't think any of this testimony is relevant. So far as witnesses he has 2600 men—

The Court:
He wants some experts.

Mr. Burr:
Your Honor remembers what Sam Jones said about experts. I will not quote it here.

Mr. Harris:
Two of my clients will give up their places on the man-trip so it will not make it any more crowded than on regular trips.

Mr. Burr:
We like the looks of your clients.

The Court:
Well, let's—

Mr. Harris:
I am not being facetious.

The Court:
I don't think there is anything facetious about it. The order will be signed.

Mr. Burr:

And it will be submitted to me for consideration of the terms?

The Court:

Let's don't be too meticulous about the terms.

Mr. Burr:

We will have to arrange a schedule.

The Court:

All right.

Mr. Burr:

We have nine mines of the Tennessee Company and two of the Republic and two of the Sloss, is fourteen, and Woodward is not a party,—there are thirteen mines. Of course, a schedule will have to be worked out that covers that situation.

Mr. All:

If the Court please, I think the order should be so arranged that each mine—we would know when they are going to appear to go into each mine, and, of course, we are anxious for them not to be in the mines all day, something of that sort. If they want to go and come, all right. Spending a great deal of time in the mine is one thing. Of course, as Mr. Burr stated, Your Honor is making the restriction.

Mr. Harris:

We will submit the order.

The Court:

Mr. All, I assume these other gentlemen will be reasonable and you all will be reasonable too in the time consumed in examining these mines.

Mr. Burr:
I think if Mr. Harris is going to draw the order, if he will prepare it and submit it to me, we can get together on it.

Mr. Harris:
Perhaps we can get together on it before we draw the order.

Mr. Burr:
Well, you prepare it and we will work it out.

The Court:
Is that all the motions? Are we ready for the plaintiffs to proceed?

Mr. Burr:
Yes, sir. As you know, personally—

The Court:
I signed an order consolidating these cases for the purposes of trial.

Mr. Burr:
All right, sir. May I suggest we ought to have the record show that during the trial all testimony introduced by anyone is considered as admitted in each case separately
Is that satisfactory?

The Court:
That is agreeable with the Court.

Mr. Brodie:
I am sorry, I didn't get that.

Mr. Burr:

That all evidence presented by any party is considered as being offered on behalf of all persons unless a statement is made at the time it is not so offered. That will protect your two unions.

Mr. Harris:

There is one difference I have, and you gentlemen may have other differences. There is certain evidence that may come in that is applicable—as the pleadings stand here, if he offers evidence on—if that evidence is let in it may be applicable to the entire situation, and then there may be other evidence that will be pertinent and material only to a particular company or a particular mine. I don't think the conditions that exist at Muscoda or Ishkooda or Wenonah,—that any evidence that comes out with reference to those conditions has anything to do with what goes on at Republic or Woodward, and I think Mr. Burr will agree with me on that.

Mr. Burr:

I think under the broad aspects of this case it will be relevant testimony.

The Court:

I think—

Mr. Harris:

Your Honor is going to find—

The Court:

I may be there is such lack of relevancy—

Mr. Harris:

I wouldn't want to make any blanket agreement until I see what it is. You can't eliminate facts.

Mr. Burr:

My suggestion was not a blanket agreement, but that unless someone suggests otherwise it be considered as applicable to all cases.

The Court:

It be considered as applicable to all the cases?

Mr. Brodie:

I would prefer the evidence be introduced with respect to what it is being produced for, and not with respect to something else. I cannot enter into any such agreement as Mr. Burr suggests. These mines are all different. They may put an engineer on that knows about one mine—

The Court:

Do you want to try these cases separately?—

Mr. Brodie:

No, sir.

The Court:

If you do, I will do it.

Mr. Brodie:

No, sir; no, Your Honor. Suppose they put a witness on that is familiar with a certain mine,—we will not know until he has been on the stand for hours,—we will not know what he is testifying to, and with what he is familiar. How can I bind myself all the testimony will be applicable to every issue in the case?

Mr. Burr:

All right.

Mr. All:

Let me make this statement.

The Court:
I think we had better not make an agreement.

Mr. All:
It would be anomalous to suggest that the portal to portal applies to one mine and not another. You couldn't say this order applies to Sloss and couldn't apply to Republic or anything of that sort. This evidence that might involve conditions as between mines is evidence of a general condition that affects the issues as to everybody, if it does at all.

The Court:
That is my idea about it.

Mr. All:
That is my idea.

Mr. Smith:
At this time—I don't think we have done it yet,—I want to reinterpose my answer to the bill of complaint as amended—

The Court:
Do you want to address the Court on the subject now under consideration?

Mr. Smith:
I want to do that too.

The Court:
I would prefer you to do that.

Mr. Smith:
I presume, this being an equity case, the Court will consider only pertinent evidence,—consider evidence that is pertinent to the Tennessee Company mines, consider

evidence that is pertinent to the Sloss mines, consider evidence that is pertinent to the Republic Company's mines, it being an equity procedure. That is just my thought on the matter while we are at it.

The Court:
Yes.

Mr. Harris:
Judge, I don't want any impression to get out we want to draw the case out.

The Court:
I don't think that.

Mr. Harris:
I represent thousands of different individuals; those different individuals have different claims and work under different conditions. The mines, some of them, are miles from the other, and the investigation I have been able to make in this case since I got back from my trip to the east leads me to the conclusion I wouldn't attempt for a moment to say the testimony which applied to one of these mines applied to the other, and I cannot, in justice to the clients I represent,—I cannot make a blanket agreement that might injure my clients and might cause confusion in the mind of the Court.

The Court:
I think we had better go on and if you have an objection, state it.

Mr. Burr:
There is one other matter, so I will know how to conduct the handling of the case and my associates also will know. We are perfectly willing, as far as we are con-

cerned, to let any objection that is made by any party, and any exception that is taken by any party be considered as made for the benefit of all parties and taken by all parties. I can't see any possible objection to that. If these gentlemen want—every time you object to the Court you have to object separately for each defendant or each plaintiff—

Mr. Harris:

We feel that would expedite the trial. In other words, if I get up and make an objection—

The Court:

Somebody else wouldn't have to object?

Mr. Harris:

Yes, wouldn't have to get up and repeat the objection; if Mr. Burr makes an objection, Mr. All does not have to get up and repeat it, if that is what you mean—

Mr. Burr:

I don't see how it could be any clearer.

The Court:

It is understood if anyone on a side makes an objection it will be considered as interposed for the benefit of all on that side.

Now, it is my understanding under the new rules you don't have to take an exception.

Mr. Burr:

I think that is right. At any rate, we will go on that basis.

Mr. Brodie:

With the addition if any party has anything he wishes to say, or wishes to make a different point, or does not

wish to object but wishes the evidence to go in, he may specify.

The Court:
Give your reasons?

Mr. Brodie:
Yes.

The Court:
Give the grounds for your objection.

Mr. Brodie:
Yes.

The Court:
In other words, if Colonel Harris gets up and objects and states his reasons and you may have other reasons, you may state your additional grounds.

Mr. Brodie:
We might not want to object.

The Court:
You want to reserve—

Mr. Harris:
We can easily fix that. Whenever a man objects and thinks his objection is particular or peculiar to his own case or his own client, he can very easily call the attention of the Court to it. I wouldn't want this agreement to operate as a waiver of any theory of law or any right anybody has, and I don't think Mr. Burr does. With the understanding that agreement is to expedite the trial of the case and shall not operate as a waiver of any right or any testimony—That is what you have in mind?

Mr. Brodie:
Yes, sir.

The Court:
That is all right.

Mr. Burr:
I think if, at any time, I made an objection and Mr. All didn't want it to apply to his client, he could say so.

The Court:
Or if Mr. All had an additional ground he could state it.

Mr. Burr:
Yes. Is Your Honor ready to proceed?

The Court:
Yes, sir. Anything further?

Mr. Harris:
I was wondering if we could have a four or five minute recess.

Mr. Burr:
There is one other thing—

The Court:
We will have a few minutes recess.

Mr. Smith:
How about the order of cross examination? I had this thought. Of course, the burden is on these gentlemen to make out their case. After they examine their witnesses, it becomes the question of the order as to who shall cross examine them next. In the order in which the

bill of complaints are filed, I think the CIO comes first, Mr. Harris' client, and mine second, and then the Administrator. I am perfectly willing, in the state of the case, for Mr. Harris to have the first examination under the order in which the defendants are listed, and the intervener next, and we will examine after that. I am perfectly willing to do that.

The Court:
Is that satisfactory?

Mr. Brodie:
I take it Mr. Harris will cross examine first and me last, or are we last?

Mr. Smith:
I am conceding you are second.

The Court:
He is giving you second.

Mr. Smith:
I think it will keep down a lot of duplication.

The Court:
I think that is all right.

Mr. Smith:
I don't know whether we have or not, Your Honor, but I would like to interpose our answer to the bill as amended. I don't know whether that has been done or not.

The Court:
It hasn't been done. The clerk will refile it. Have you prepared your answer?

Mr. Harris:
I thought I would refile it.

Mr. Smith:
We will have to refile it by separate paper?

The Court:
No; just let it be refiled.

Mr. Smith:
We offer to refile now our answer to the bill of complaint as amended.

Mr. Harris:
Since we are taking up those preliminary matters, I mentioned to Mr. Burr before there were men coming in with their contracts to us, and I have not been bothering to come down and make amendments and put in these other men who didn't get in at the time. At some time during the time I want to add additional parties.

Mr. Burr:
That is all right.

Mr. Harris:
And then there is one other paragraph that doesn't affect the legal propositions where I was under a misapprehension that I will want to amend.

Mr. Burr:
That is all right.

The Court:
All right.

Mr. Smith:

Your Honor, we made a demand for all persons similarly interested. When we started out this case Your Honor intimated you were going to take it up piece meal, and necessarily if Your Honor decides the declaratory judgment should be issued you will never reach the cross claim, but if you do reach the cross claim and decide in our favor that the declaratory judgment be denied, it comes up on that matter.

I would like to have it understood we have three or four hundred names of individual miners, but we don't at this time want to burden the Court by putting in that cross claim, but we want to do it at the proper time.

The Court:

Didn't I state—it is my idea now the thing for me to determine now is the question in this case the work-week?

Mr. Smith:

That is right.

The Court:

And if I did rule adversely to the plaintiffs I would appoint a special master to go into the claims.

Mr. Smith:

What I was thinking about was amending the cross claim so as to include all these individuals at this time. I want leave—

The Court:

I think it would be perfectly all right for you to be permitted to do that later.

Will that be all right, Mr. Burr?

Mr. Burr:

Yes, sir. I think all these preliminary matters can be disposed of by the order on pre-trial hearing. That is the first thing I want to offer in this connection. It reads as follows:

"The following pleadings and amendments were allowed:

"Complaints and answers of defendants:"

I suggest for the record that be made the amended complaint and answers of the defendants as refiled to the amended complaint. I think that will cover that.

The Court:

Yes, sir.

Mr. Burr:

Next is the answer to the counter claim. That is not involved here now.

The Court:

That is not involved here now. The defendants will be given opportunity to present the counter claims later if they become relevant.

Mr. Burr:

"It was agreed by all of the parties that the following are all of the issues in controversy in this cause:

"What constitutes the working time which makes up the workweek of the underground ore mining employees of the plaintiffs within the meaning of Section 7 of the Fair Labor Standards Act of 1938."

The Court:
Didn't we go over that on pretrial?

Mr. Burr:
Yes, sir. I am offering it now. The only issue we have here is in those words.

The Court:
Read that again.

Mr. Burr:
"What constitutes the working time which makes up the workweek of the underground ore mining employees of the plaintiffs within the meaning of Section 7 of the Fair Labor Standards Act of 1938.

"(1) In reference to 'a' above, the plaintiff contends that such workweek does not include that portion of the time spent by the underground ore mining employees in being transported or walking to and from their usual working places.

"(2) In reference to 'a' above, the defendants contend that the workweek covers all time from portal to portal as announced in the opinion and report of the Wage and Hour Administrator under the Fair Labor Standards Act on March 23, 1941, and also includes aggregate of the time spent on the surface in obtaining and returning lamps, carbide and tools and in checking in and out."

That is the admitted issue we have to try.

Mr. Burr:
Now, we offer the pre-trial agreement also in reference to the following facts:

"(a) Suit is brought in the correct name of the proper plaintiffs and against the correct defendants in their proper names.

"(b) Plaintiff is, and during all of the period of time herein involved was, a corporation organized under the laws of the State as alleged in its complaint; that the plaintiff is a resident of said state of its incorporation authorized to transact business in the State of Alabama, and it has a principal place of business and mining and *manufacturing operations in Jefferson County*, State of Alabama."

The Court:
I signed that as an order.

Mr. Burr:
I know you did.

The Court:
It is in the file.

Mr. Burr:
It is in the file as an order. I was bringing it to our attention so we would know—

The Court:
All right.

Mr. Burr:
I want to get it in the record. I don't want to take time proving something that is admitted.

The Court:
All right.

Mr. Burr:

"(c) All the defendants named in the complaint are citizens and residents of Jefferson County, Alabama.

"(d) It is admitted that this is a class action in which the Court shall determine whether or not the named defendants fairly represent the class of underground iron ore mining employees of the plaintiffs."

I think that covers the issues.

Mr. Harris:

There is one other thing—

The Court:

There were some that did not belong to any union.

Mr. Harris:

There are some men that did not belong to any union.

The Court:

Wasn't it agreed if anybody had any right of action they might come in?

Mr. Burr:

Yes, sir, that was understood.

The Court:

That saves multiplicity of cases

Mr. Burr:

Yes, sir.

Mr. Harris:

I had another matter on the evidence proposition. I had in mind it was stated in open Court and it was

understood there is no question but that the plaintiffs material to this issue were at the time of the filing of the complaint, and at all times involved, engaged in interstate commerce.

Mr. Burr:
That is admitted. It is charged in our complaint.

The Court:
All right.

Mr. Harris:
There is another thing I haven't discussed with Mr. Burr. Mr. Lipscomb has brought it to my attention several times. I frankly confess I don't see how to handle it. There are some hundred or more men who have died, and their widows are interested.

Mr. Burr:
You have plenty of time to bring that up.

Mr. Harris:
If we could enter into a stipulation—

Mr. Smith:
Colonel, won't that come up—

Mr. Harris:
I want an understanding about it now. They are not living people. If it is understood that those people, regardless of this time question,—there may be a question of time,—some reasonable understanding for those people—

Mr. Burr:
I am perfectly willing for you to put them in, Administrator, or anybody you please, and consider them as represented.

The Court:
That is right.

Mr. Burr:
As I see this case, we have certainly more than enough employees to make this a class action.

The Court:
Certainly.

Mr. Burr:
No question about that; probably ninety-five percent of them are represented.

The Court:
That is all right.

Mr. Harris:
Mr. Cooper calls my attention to the fact that I didn't make my statement broad enough; that all the plaintiffs were engaged in interstate commerce as well as the defendants.

Mr. Burr:
No, I don't admit they are engaged in interstate commerce. I will stipulate they are engaged in the production of goods for interstate commerce.

The Court:
Anything else?

Mr. Brodie:
Mr. Burr, in reading from the pre-trial order stated that the defendants contend that the workweek covers all time from portal to portal as announced in the opinion and report of the Wage and Hour Administrator. Excluded from the time is the half hour lunch period.

Mr. Burr:
That is what the opinion says.

The Court:
Wasn't that entered in the pre-trial order?

Mr. Brodie:
I am speaking of the statement of Mr. Burr.

The Court:
The half hour lunch period is not included.

Mr. Burr:
Not included in the pleadings from top to bottom.

The Court:
Anything else before we adjourn temporarily? We will take a few minutes recess.

Mr. Burr:
How long?

The Court:
Just a few minutes. How long do you want?

Mr. Burr:
Ten minutes.

Mr. Harris:
I think ten minutes would be better, Judge.

The Court:
All right, ten minutes, then.

(Thereupon proceedings were in recess from 11:30 A. M. to 11:45 A. M., at which time proceedings were resumed as follows:)

The Court:
All right.

Mr. Burr:
We will examine Mr. E. M. Ball first.

Evidence on Behalf of Plaintiffs.

720 E. M. BALL, being called as a witness, and being duly sworn, testified as follows:

Direct Examination.

(By Mr. Burr):

Q. Mr. Ball, what is your present position with the Tennessee Coal, Iron & Railroad Company?

A. General Superintendent of ore mines and quarries.

Q. And how long have you had that position?

A. Since January 1, 1924,—17 years.

Q. Mr. Ball, I wish you would give to the Court your previous training and experience, beginning with what college you graduated from and then rapidly bring it down to date. Please give those as near as you can recall them.

A. I attended Washington & Lee University one year, University of Wisconsin four years, graduating in 1909.

Q. With what kind of degree?

A. General engineering,—B. S. in general engineering.

Q. All right, sir. Do you mind telling how old you were then?

A. 22.

Q. 22?

A. Yes, sir.

Q. All right, sir.

A. After graduating I went to the Oliver Mining Company at Hibbing, Minnesota, and worked there two or three years and came back to the Tennessee Company as construction engineer.

Q. Is the mine referred to at Hibbing in the Lake Superior Ore District?

A. Yes, sir. After being construction engineer for some time, in 1912 I was made superintendent of the Ishkooda Division. I was there approximately twelve years, and then was superintendent of the Wenonah Division for about a year, after which I was appointed general superintendent of ore mines and quarries.

During my summer vacations while attending college, I worked in the blacksmith shop, repair gang, rodman and transitman, and one year, when I was out of college, in 1907, I was division engineer at the Wenonah Division.

Q. At where?

A. At the Wenonah Division.

Q. That covers broadly your experience—

A. Yes, sir.

Q. —in connection with the plaintiff, the Tennessee Company?

A. Yes, sir.

Q. Since you have been general superintendent of ore mines and quarries, has your office been at one of the divisions, your general office, and if so, which division?

A. At the Muscoda Division.

Q. At the Muscoda Division?

A. Yes, sir.

Q. As the general superintendent of ore mines and quarries, how many ore mines have you under your supervision?

A. Eight ore mines and one limestone mine; two iron ore mines at Muscoda Division, Number 4 and Number 6, and one limestone mine at the Muscoda Division called Number 5; four iron mines at the Wenonah Division,

Numbers 7, 8, 9 and 10, and two iron ore mines at the Ishkooda Division, Numbers 11 and 13.

Q. Now, Mr. Ball, I want you to understand until I tell you to the contrary that all periods of time relate prior to May 1, 1941.

A. I understand.

Q. I may use the present tense, but I hope you will answer the questions with that understanding between us.

A. Yes, sir.

Q. The ore mines you have just mentioned were all in operation prior to May 1, 1941?

A. Yes, sir.

Q. And also the limestone mine you mentioned?

A. It was.

Q. What division is the limestone you mentioned located in?

A. In the Muscoda Division, near Bessemer, Alabama.

Q. The Muscoda Division?

A. Yes, sir.

Q. I wish you would tell the Court whether the limestone mine, with reference to the method of operation, with reference to slopes and so on, is substantially the same as the iron ore mines?

Mr. Brodie:

I object to that question, if Your Honor please. We are not concerned here with the limestone mine. That question is not material.

Mr. Burr:

Of course, it is highly material. There is nothing in Section 7 of the Act that refers to iron ore mines or limestone mines or any other mines.

The Court:

Overruled.

Mr. Burr:

I propose to show the conditions.

Q. Are the conditions the same or different?

A. In the limestone mine we are operating there and mining a seam of limestone about 28 feet thick which overlies the iron ore seam about 300 feet. To reach this mine we go down in the old Number 5 ore slope and from there by incline up approximately 300 feet up to the limestone strata above. Levels are turned off in this limestone mine in practically the same way as they are in the ore mines, and then the sloping of the limestone mine from one level to another is practically the same as in our Number 13 iron ore mine.

The equipment used is practically the same, mechanical loaders, drills and so forth.

Q. Is the transportation, taking the men down practically the same?

A. Yes, sir.

Q. Do they walk to their working places after they get in?

A. After they get—

Mr. Brodie:

May it be understood I have an objection to this whole line of testimony?

The Court:

Yes, sir. The same ruling.

Mr. Burr:

That is agreeable to us. He may have an objection to all the line of questioning involving the limestone mine.

Q. I wish you would tell us, Mr. Ball, next about the approximate location of these iron ore mines and the limestone mine so we can get some idea of the distanees. Take Muscoda first. What mines are located at Muscoda?

A. Number 4 and number 6 iron ore mines and—.

Q. How far is number 6 from Number 4?

A. Approximately 3000 feet, I would say, between the slope entrances?

Q. What mine is next?

A. The Number 5 limestone mine is between the Number 4 iron mine and the Number 6 iron ore mine.

Q. How far is the Number 5 mine from the Number 4 mine?

A. Approximately a thousand feet, I would say.

Q. And how far from Number 6?

A. Probably 1500 feet, roughly.

Q. Were there any other ore mines in the Muscoda Division besides those I asked you about?

A. No, sir.

Q. They constitute the Muscoda Division?

A. Yes, sir.

Q. For the record—of course, the Court knows—how far are those mines from the City of Bessemer?

A. Approximately a mile.

Q. And do the slopes go down into Red Mountain?

A. Yes, sir.

Q. And that is true of all the mines, all slopes go down into Red Mountain?

A. All the entrances to the mines of the Tennessee Company are by slopes, and the slopes are driven from the outcrop and follow along the ore seam to the ore basin.

Q. Coming up toe mountain you next come to the Wenonah Division; is that correct?

A. That is correct.

Q. How far is the Wenonah Division from the Muscoda Division as the crow flies?

A. Approximately five miles. The mines are opposite the little station called Brown's Station, on the South Bessemer car line.

Q. How many mines do you have at Muscoda?

A. Four; the mines are Number 7, 8, 9 and Number 10.

Q. Are they ore mines?

A. Yes, sir.

Q. How far apart are they? Are they close to each other?

A. Oh, the slopes are generally—they would carry from 2000 feet up to 3000 feet. I don't recall the exact distances. We have our map here showing the scale, if you wish.

Q. I will get to that further on. Coming on further towards Birmingham you come to the Ishkooda Division?

A. Ishkooda.

Q. What mines do you have there?

A. Mines Number 11 and Number 13. They are approximately a mile from a station known as Powderly Station on the South Bessemer car line.

Q. Do you know, to get the general perspective of the whole situation, whereabouts the two mines of the Sloss Company are located on the mountain? Are they located adjacent to the Tennessee Company properties?

A. They are located adjacent to the Number 6 mine at Muscoda, and between the Woodward Iron Company's mine and the Tennessee Company mines.

Q. How many slope mines do the other companies have there in that territory?

A. Several.

Q. Do you know how many are in operation at this time?

A. No, I do not.

Q. Is there any other company that has mines on this mountain?

A. Woodward Iron Company.

Q. Where are their mines located?

A. Their mines are located on the right hand side of the Number 7 mine of the Wenonah Division, and be-

tween Number 7 of the Tennessee Company and the Sloss Company.

Mr. Harris:

When you say the right hand side, you mean coming down the mountain?

The Witness:

Looking down the mine.

Q. How about the Republic Steel Corporation? Have they any mines on the mountain?

A. They have a mine called Raimund, which is southwest of our Muscoda group of mines. They also have a mine called Spaulding, which is on the north side, approximately of our Number 13 mine,—the northeast side, and towards Birmingham.

Q. Are all these mines now located on Red Mountain?

A. They are.

Q. And all of them are slope mines?

A. Yes, sir, with the exception of the Sango Mine of the Woodward Iron Company, which was originally a slope mine, but a portion of the slope has been abandoned and the mine entrance is now through a shaft, and the balance is a slope.

Q. I see. Could you tell the Court approximately the number of underground mining employees that the Tennessee Company had working in all of its mines, including the limestone quarry,—I mean the limestone mine?

A. Approximately 2,650.

Q. That is the underground men?

A. Or 2700 men; around that figure approximately.

Q. That includes all the ore mines and the limestone mine?

A. Yes, sir.

Q. Those, as I understand, are the underground mining employees?

A. Those are all the employees from the mine portal down into the mine.

Q. Are your underground employees divided broadly into two classes?

A. We have two classes, one known as production men, miners,—we call them heading crews—

Q. I see.

A. —and another set of men called service crews, which are the timber men, track men, motormen and transportation men.

Q. They are the men who are usually and commonly referred to as company men, are they not?

A. That is right. The old name used to be company men.

Q. The ones you refer to as productive employees, the miners, are the ones engaged in producing the iron ore?

A. In producing the iron ore at the working face.

Q. At the working face?

A. Yes, sir.

Q. Could you tell the Court the proportion of underground employees that were service men as contrasted with the proportion that were productive men?

A. Approximately 58 or 60 percent of the underground men are service men who service the 40 percent, roughly, of the mining crews.

Q. Now, Mr. Ball, I wish you would tell the Court the method of—the access to the mine workings in these slope mines.

A. In general our mine workings enter at or near the outcrop of the ore seam and go downhill at approximately a 25 or 30 degree pitch for a distance varying from 1000 to 1500 feet, when there is a gradual flattening out of the ore seam to about 5 or 6 degrees at the present bottom of our mines.

Q. What is the average seam of your workable ore there?

A. Ten feet, more or less; ten feet at the Muscoda Division, varying to around 8 feet at the Wenonah Division, and approximately ten or 11 feet at the Ishkooda Division.

Q. Is the depth, if that is the proper name to call it, of the slopes uniform in all the mines, or does it vary?

A. They are all approximately 6000 feet more or less. Some of them are 6200 feet and some 5800. All our slopes reach bottom at what is known as the basin of the ore seam, where we have pockets from which the ore is dumped into skips and brought to the surface.

Mr. Brodie:

I am sorry I didn't get that word,—basin?

The Witness:

Ore basin.

The Court:

B-a-s-i-n?

The Witness:

Correct. The average distance along the ore seam from the outcrop is approximately 6000 feet, but the average cover, vertical cover over the mines would be around 1200 feet.

Q. In the process of the development of those mines you drive the slopes down, do you?

A. Yes, sir.

Q. That is the first thing that is done?

A. Yes, sir.

Q. Then when you—how far was the slope originally driven before we come to a place where the ore is first produced, worked?

A. Well, in the old days you had to drive through the soft ore from the outcrop for a distance of three hundred

feet, and the ore is called soft ore from the fact the lime content in the ore has been leached out by weathering.

Q. Originally you would mine that ore first?

A. Oh, yes.

Q. That was how far from the mouth of the mine?

A. That soft ore covered a distance of about 300 feet from the outcrop down the ore seam, and as the workings advanced you turned headings off at different intervals.

Q. As the workings keep on advancing, the headings get further down the slope; is that right?

A. That is correct.

Q. Until the other headings are down in the basin?

A. The mine pocket is at the basin but the workings extend beyond the mine pocket.

Q. The mine pocket?

The Court:

Let me ask you a question. Can you use that ore, Mr. Ball?

Mr. Burr:

Yes, sir.

The Witness:

Yes, sir. It was in the olden days.

The Court:

You said it used to be.

The Witness:

I meant to refer back to the old days when they mined part of the outcrop.

Q. Those have been worked out now, have they not?

A. Yes, sir.

Q. As I understand, you take the slope down when you first open the mine until you reach the first workable ore?

A. That is right.

Q. That is worked out—

A. In fact, you drive your slope on the ore.

Q. You drive your slope on the ore and that is worked out and you turn headings to the right—at what intervals are those headings turned off?

A. A good many years ago they used to be turned off at sixty feet, and then from 1915 up to the present date they turned them off at intervals varying from 180 to 220 feet. Our present practice is approximately 220 feet between levels.

Q. The time of travel in the slope becomes then greater as the mines are extended?

A. That is correct.

Q. I will ask you if, in the original workings and when the mines are first opened and are shallow, if the men didn't walk to their working places down the slope?

Mr. Brodie:

If Your Honor please, at this time I would like to enter an objection to the words "working place". It is our contention the entire mine is the working place.

The Court:

I understand that.

Mr. Burr:

Your Honor understands what I mean.

Mr. Brodie:

May I ask that the counsel use the term "face" instead of "working place"?

The Court:

As I understand he is interrogating the witness as to the places from which he is producing ore.

Mr. Brodie:

The crux of this case is what is the working place.

The Court:

That is not binding on my mind. I understand what the witness is talking about.

Mr. Brodie:

Yes, sir, but we also have a record that is undoubtedly going up on appeal, and while Your Honor might understand it, the appellate judge might not, not being familiar with the phraseology.

The Court:

What do you suggest we use?

Mr. Brodie:

I suggest they use face.

Mr. Burr:

If Your Honor please, the face is not the working place half the time. The face is only the working place—

The Court:

I will overrule the objection.

Mr. Burr:

Read the question.

(Thereupon the reporter read the question last propounded as above recorded.)

Q. Is that true or not?

A. It is. In the Muscoda group they hauled men in 1903 or '04, but in some of the mines in the Ishkooda Division some of the men walked to their working places as late as 1923.

The Court:

And the working place to which you are referring is what has been referred to as the working place up to May 1, 1941?

The Witness:

The working place, we consider the heading in which the ore stopes are in, and the working face may be at three or four points at which the miners can drill the ore from the solid.

Q. Yes.

A. I can illustrate by a sketch in a few minutes.

Q. All right, if you will. Get a piece of chalk.

A. The Judge might like to have that.

Mr. Brodie:

If Your Honor please, may I suggest at this point that a map be produced and used instead of this so that it can go in the record? I would certainly like for it to go in the record.

The Witness:

We can do that.

Mr. Burr:

I prefer to go on with the case as I usually try them. If he wants it in the record it can be gotten there.

The Court:

Overrule the objection.

Mr. Brodie:

May I have a ruling on my objection?

The Court:

I say I overrule it.

Mr. Brodie:

A. This area here is considered the working place. You have your chutes here.

Mr. Harris:

He said considered. Is that considered by him?

The Court:

Yes.

Q. That is what you are testifying is the working place, Mr. Ball?

A. Yes.

The Court:

You say that is the working place?

The Witness:

Yes, sir. In driving this slope this ore is taken out this way. At this place between there are your pillars. These parts here where you take the ore out is called the working face, whereas the entire section, which contains the stope and heading, is called the working place.

Q. Is that the accepted definition of the—

Mr. Harris:

We object to that.

A. It is with the Tennessee Coal, Iron & Railroad Company.

Q. In your operations?

Mr. Harris:

Wait a minute. We object.